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No.

# In the Supreme Court of the United States

OCTOBER TERM, 1983

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UNITED STATES OF AMERICA, PETITIONER

*v.*

PAUL B. LORENZETTI

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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REX E. LEE
*Solicitor General*

J. PAUL MCGRATH
*Assistant Attorney General*

KENNETH S. GELLER
*Deputy Solicitor General*

CAROLYN F. CORWIN
*Assistant to the Solicitor General*

WILLIAM KANTER
FREDDI LIPSTEIN
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTION PRESENTED

Whether a federal employee who has received Federal Employees' Compensation Act benefits for injuries suffered in the course of his employment is obligated by 5 U.S.C. 8132 to reimburse the United States out of damages recovered from a negligent third party when a state no-fault automobile insurance statute allows such tort recovery for pain and suffering but not for medical expenses and lost wages.

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-11a) is reported at 710 F.2d 982. The opinion of the district court (App. C, *infra*, 13a-18a) is reported at 550 F. Supp. 997.

### JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 12a) was entered on June 22, 1983. On September 13, 1983, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including November 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory and regulatory provisions are reproduced in App. E, *infra*, 20a-25a.

## STATEMENT

1. a. The Federal Employees' Compensation Act (FECA, or the Act), 5 U.S.C. 8101 *et seq.*, establishes a comprehensive program of benefits for government employees injured in work-related accidents. If an employee is injured "while in the performance of his duty" (5 U.S.C. 8102(a)), he is entitled to compensation for expenses of medical and related services (5 U.S.C. 8103, 8111) and vocational rehabilitation (5 U.S.C. 8104) and for a percentage of his lost wages (5 U.S.C. 8105-8107, 8110). Benefits may be paid to an employee's survivors in the case of death (5 U.S.C. 8133, 8134). The FECA was designed to give injured federal employees a speedy and certain recovery for work-related injuries, regardless of fault or contributory negligence and without the need for litigation or expense. See *Lockheed Aircraft Corp.* v. *United States*, No. 81-1181 (Feb. 23, 1983), slip op. 4; *Johansen* v. *United States*, 343 U.S. 427, 439-441 (1952); *Dahn* v. *Davis*, 258 U.S. 421, 431 (1922).

The FECA provides that the government is entitled to receive reimbursement for benefits paid in connection with an injury if an employee succeeds in recovering from a third-party tortfeasor. When an employee receives FECA benefits for an injury "creating a legal liability in a person other than the United States to pay damages," the Secretary of Labor may require the employee to bring a third-party action or assign the cause of action to the United States (5 U.S.C. 8131(a)). If the action is assigned to the United States, the Secretary may prosecute or compromise the action, and any recovery must first satisfy the FECA compensation fund

for the amount of benefits already paid to the employee. However, the Act provides that the employee must receive at least one-fifth of the net amount of the settlement or recovery (after deduction of the costs of settlement or recovery). 5 U.S.C. 8131(c). If the employee refuses to assign or prosecute his cause of action, he is not entitled to receive FECA compensation (5 U.S.C. 8131(b)).

If the employee himself receives "money or other property" in satisfaction of the legal liability of a third party to pay damages, he may deduct the cost of recovery, including a reasonable attorney's fee, and may retain one-fifth of the net amount. Following those deductions, the employee must reimburse the FECA compensation fund for any FECA benefits already paid to him and must credit the surplus to future compensation payments for the same injury. 5 U.S.C. 8132. The Act provides that "[n]o court, insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States" (*ibid.*). Pursuant to 5 U.S.C. 8149, the delegation of rulemaking authority to the Secretary of Labor, the Secretary has promulgated 20 C.F.R. 10.503, which sets out procedures for reimbursement of the FECA compensation fund from third-party recoveries.

b. The Pennsylvania No-Fault Motor Vehicle Insurance Act (No-Fault Act), Pa. Stat. Ann. tit. 40, §§ 1009.101 *et seq.* (Purdon Cum. Supp. 1983), became effective in 1975. The primary purpose of the No-Fault Act is to provide, at reasonable cost, prompt and adequate basic loss benefits to victims of motor vehicle accidents and their survivors. See *id.* § 1009.102(b). To accomplish this goal, the No-Fault Act provides for the payment of benefits for basic economic losses on a first-party basis, *i.e.*, an accident victim's own insurance

company pays for basic losses (including an unlimited amount of medical expenses and lost wages up to $15,000), regardless of fault (*id.* §§ 1009.104, 1009.106, 1009.202). The No-Fault Act defines "basic loss benefits" that must be paid by the no-fault insurer as "net loss sustained by a victim, subject to any applicable limitation [or] exclusions * * *" (*id.* § 1009.103). In computing "net loss" a no-fault insurer may deduct any government benefits, including workers' compensation, that the victim receives or is entitled to receive because of his injury, "unless the law authorizing or providing for such benefits or advantages makes them excess or secondary to the benefits in accordance with this act * * *" (*id.* § 1009.206(a)). Thus, a no-fault insurer in Pennsylvania is not required to pay benefits for losses that also are covered by a program such as the FECA.

The No-Fault Act partially abolishes tort liability for injuries in Pennsylvania that arise out of the use and maintenance of a motor vehicle. A victim may not obtain a tort recovery for economic losses (*e.g.*, medical expenses and lost wages), except to the extent they are not compensated because they exceed statutory no-fault coverage limits. Pa. Stat. Ann. tit. 40, § 1009.301(a)(4) (Purdon Cum. Supp. 1983). Thus, a tortfeasor is not liable for medical expenses or the first $15,000 in lost wages, since the No-Fault Act requires the no-fault insurer to pay all such expenses; however, a tortfeasor would be liable for any lost wages over and above the $15,000 statutory ceiling on no-fault coverage for that category of loss. A tortfeasor remains liable for damages for noneconomic losses (*e.g.*, pain and suffering) if an accident results in death or serious and permanent injury, if the reasonable value of necessary medical and dental services exceeds $750, or if the victim is disabled for more than 60 days or suffers serious and permanent disfigurement (*id.* § 1009.301(a)(5)).

2. Respondent is a special agent for the Federal Bureau of Investigation. He was injured in Pennsylvania in November 1977 when the automobile he was driving was struck by another vehicle. At the time of the accident, respondent was performing duties in the scope of his employment. Accordingly, he received FECA benefits covering his medical expenses and a percentage of his lost wages. App. A, *infra*, 2a.

In 1979 respondent filed a tort action in the Court of Common Pleas of Philadelphia County against the driver of the vehicle that had struck his automobile. Based on the FECA benefits it had paid, the federal government asserted a subrogation lien against any recovery by respondent. The driver of the other vehicle moved to exclude proof of medical expenses and lost wages, on the ground that, under the terms of the No-Fault Act, damages for such losses may not be recovered from a tortfeasor. The Court of Common Pleas agreed that respondent should not be permitted to prove such amounts, including $1,600.24 paid by the United States in the form of FECA benefits. Respondent ultimately settled the tort action for $8,500. The settlement figure represented compensation only for noneconomic losses, *i.e.*, pain and suffering. App. A, *infra*, 6a; App. C, *infra*, 14a.

Pursuant to 5 U.S.C. 8132, the United States asserted its right to be reimbursed from respondent's settlement in the amount of the FECA benefits he had received.[1] Respondent then filed this declaratory judgment action in the United States District Court for the Eastern District of Pennsylvania to prevent the government from recovering the amount of the FECA ben-

[1] The district court stated that the government actually claimed only $1,044.38, following deduction of an attorney's fee from total benefits of $1,600.24, pursuant to 5 U.S.C. 8132 (App. C, *infra*, 13a n.1). In fact, the figure of $1,600.24 already reflects the deduction of an attorney's fee.

efits. Respondent contended that because the No-Fault Act precluded him from recovering damages for medical expenses and lost wages from the tortfeasor, the government should not be permitted to obtain reimbursement for the benefits it had paid to compensate for such losses.

3. The district court granted summary judgment for the United States. The court held that the government was entitled to seek reimbursement from respondent's third-party tort recovery, even though that recovery represented compensation only for his noneconomic losses, not for his medical expenses and lost wages. App. C, *infra*, 13a-18a. In concluding that all third-party recoveries give rise to a duty to reimburse the government, the district court relied in large part on the decision in *Ostrowski* v. *Dep't of Labor, OWCP*, 653 F.2d 229 (6th Cir. 1981), which involved the identical issue in the context of the Michigan no-fault statute. The Sixth Circuit held in *Ostrowski* that the FECA unambiguously subjects all damages recovered from third parties to the obligation to reimburse the FECA compensation fund.

4. The court of appeals reversed (App. A, *infra*, 1a-11a), expressly rejecting the Sixth Circuit's decision in *Ostrowski* (App. A, *infra*, 5a). The court of appeals recognized that one of the primary purposes of the FECA reimbursement provision was to reduce the costs of the compensation program (*ibid.*). It concluded, however, that requiring reimbursement in cases in which an employee could not recover tort damages for medical expenses and lost wages would be "manifestly unfair" to federal employees who are subject to state no-fault statutes (*id.* at 7a). The court also concluded that reimbursement in such circumstances would not serve to prevent double recovery or to foster ease of administration and would be inconsistent with

Congress's perceived intent to make the federal government a "model employer" (*id.* at 8a).

## REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question concerning interpretation and administration of the Federal Employees' Compensation Act in states that have no-fault automobile insurance schemes. The court of appeals has held that a state no-fault statute eliminating tort liability for medical expenses and lost wages abrogates the obligation of a federal employee who obtains a third-party tort recovery to reimburse the federal government for FECA benefits he has received. The effect of that holding is to read the reimbursement provision, 5 U.S.C. 8132, out of the Act in an entire class of cases.

The court of appeals' decision is contrary to both the plain language of the FECA and the consistent interpretation of the Secretary of Labor. Unless reversed, the decision below will impose a substantial unwarranted drain on the FECA compensation fund and will generate administrative difficulties and considerable litigation for the Secretary. Moreover, the court of appeals' interpretation of the FECA conflicts with a decision of the Sixth Circuit. Review by this Court is plainly warranted.

1. The decision of the court of appeals conflicts with the Sixth Circuit's decision in *Ostrowski* v. *Dep't of Labor, OWCP*, 653 F.2d 229 (1981). In *Ostrowski* the Sixth Circuit held that the FECA requires that a federal employee reimburse the United States from his third-party tort recovery, despite the fact that (because of the limitation of tort liability imposed by the Michigan no-fault statute) the tort recovery did not include damages for economic losses covered by the FECA benefits he had received.[2] The district court opinion in

[2] The Michigan statute resembles the Pennsylvania statute in the key respect pertinent to this case; it eliminates tort liability

*Ostrowski*, on which the Sixth Circuit relied in large part, explained that a construction of 5 U.S.C. 8132 that would immunize the third-party recovery from the duty to reimburse "contradicts the plain language of the statute, the plain language of the regulations adopted to administer and enforce the statute, analogous case law, and the congressional purpose in enacting Section 8132, which was to reduce the cost of providing benefits under the Act by maximizing the amount of reimbursements while minimizing the costs of administering FECA." *Ostrowski* v. *Roman Catholic Archdiocese*, 479 F. Supp. 200, 203 (E.D. Mich. 1979). The Sixth Circuit noted in addition that the Secretary's regulation providing that the employee may retain a minimum of one-fifth of his net tort recovery, 20 C.F.R. 10.503, was designed to prevent injustice to federal employees in cases in which FECA reimbursement otherwise would wipe out the tort recovery. 653 F.2d at 230-231.

The court of appeals in this case recognized the relevance of *Ostrowski*, but squarely rejected its holding (App. A, *infra*, 5a). This conflict creates serious practical problems for the Secretary of Labor, who is charged with administration of the FECA. The conflict makes it impossible to administer uniformly the reimbursement provisions of the Act. Federal employees within the Sixth Circuit must reimburse the FECA compensation fund from their third-party tort recoveries, regardless of the operation of any no-fault statute, while federal employees within the Third Circuit may reduce or eliminate their duty to reimburse the fund by pleading the effect of a no-fault statute.

Even apart from the conflict among the circuits, the decision below is certain to produce confusion in the ad-

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for all medical expenses and for some lost wages (up to a ceiling amount) arising from use or maintenance of a motor vehicle within the state. Mich. Stat. Ann. § 24.13135 (Callaghan 1982) (Mich. Comp. Laws § 500.3135).

ministration of the FECA program and to precipitate further litigation. Sixteen states currently have some form of full-fledged no-fault recovery scheme for automobile accidents.[3] Each no-fault state has its own peculiar no-fault scheme; moreover, it is not unusual for states to amend their no-fault laws, and additional states may enact no-fault statutes in the future.[4] The Secretary would be required to study the statutory scheme and developing case law in each no-fault state in order to determine how they affect the federal government's right to reimbursement under the FECA in that state. For example, within the Third Circuit, New Jersey, like Pennsylvania, is a no-fault state. But the no-fault statutes of the two states differ in various respects, and it is unclear whether the court of appeals would conclude that the FECA should be construed to bar reimbursement of the United States in the case of automobile accidents in New Jersey.[5] As a result, the

[3] Our review of state statutes indicates that the following jurisdictions have mandatory no-fault automobile insurance schemes under which tort liability is limited in certain respects: Colorado, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, and Utah.

[4] We are advised that the Governor of New Jersey recently signed several bills significantly amending that state's no-fault statute. The District of Columbia no-fault statute went into effect earlier this year. D.C. Code Ann. §§ 35-2101 *et seq.* (Cum. Supp. 1983).

[5] The New Jersey statute does not provide expressly for broad abolition of tort liability, as does the Pennsylvania statute. However, it includes a provision that evidence of amounts collectible or paid under no-fault coverage is inadmissible in a civil action for recovery of damages for bodily injury by an injured person. N.J. Stat. Ann. § 39:6A-12 (West 1976). The New Jersey Supreme Court has held that this provision prevents the injured person from recovering from a tortfeasor for amounts collectible or paid under the no-fault program and that the no-fault insurer may not be subrogated with respect to those

government might be obliged to litigate the issue not simply on a circuit-by-circuit basis, but on a state-by-state basis within each circuit.[6] This result is intolerable as applied to a nationwide federal program affecting almost three million persons.

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amounts. *Aetna Insurance Co.* v. *Gilchrist Brothers, Inc.*, 85 N.J. 550, 428 A.2d 1254 (1981). It is unclear whether the New Jersey courts would reach a similar conclusion in a case in which an employee had received workers' compensation benefits. Cf. *Sanner* v. *Government Employees Insurance Co.*, 150 N.J. Super. 488, 491, 494-495, 376 A.2d 180 (App. Div. 1977) (per curiam), aff'd, 75 N.J. 460, 383 A.2d 429 (1978) (per curiam) (dictum suggesting that the federal government could pursue a subrogation right against the tortfeasor to recoup benefits paid to military personnel under the Medical Care Recovery Act). Recent amendments to the New Jersey no-fault statute further complicate the task of determining how the court of appeals would apply the decision below in the case of an automobile accident in New Jersey.

It is unclear whether the court of appeals' decision would affect the interpretation of the FECA in connection with an automobile accident in Delaware. Although Delaware has what is sometimes referred to as a no-fault statute, Del. Code Ann. tit. 21, § 2118 (Cum. Supp. 1982), it is generally viewed as having retained the traditional tort system of recovery. See *Burke* v. *Elliott*, 606 F.2d 375, 377 (3d Cir. 1979). But see Del. Code Ann. tit. 21, § 2118(g) (Cum. Supp. 1982) (any person eligible for no-fault benefits may not plead in an action for damages against a tortfeasor those damages for which benefits are available, whether or not such benefits are actually recoverable).

[6] Michigan and Kentucky are within the Sixth Circuit and thus presumably would be governed by the *Ostrowski* decision. Other states might be unaffected by the rationale of the court of appeals' decision in this case because of the manner in which the state courts have construed their no-fault statute. However, we believe further litigation would be necessary in most no-fault states before this could be determined with any certainty.

Other states that have partial no-fault systems, such as Delaware, might be affected by the court of appeals' decision, depending on the features included in the statute in question. See note 5, *supra*.

The court of appeals' decision will have a substantial impact on the federal Treasury. The Department of Labor informs us that there are now 48 pending third-party claims involving automobile accidents in Pennsylvania, with over $405,000 at stake. In addition, the Department is aware of 650 potential third-party claims involving automobile accidents in Pennsylvania, with more than $6 million at stake. The court of appeals' decision will preclude the government from recovering much of these amounts.[7] The potential for lost reimbursement within the Third Circuit could be even higher, depending on how the court of appeals applies its decision in the context of the New Jersey and Delaware no-fault statutes. The fiscal effect also would increase if the holding of the court of appeals were adopted in other circuits.

2. The practical difficulties that would result from the court of appeals' decision need not be suffered, because that decision is incorrect.

a. The starting point in construing a statute is the language of the statute itself. *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The reimbursement provision of the FECA, 5 U.S.C. 8132, states in pertinent part:

> If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary * * * receives money or other property in satisfaction of that liability * * * the bene-

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[7] The government might be able to obtain reimbursement for some portion of FECA compensation it has paid in connection with Pennsylvania automobile accidents, but only to the extent of lost wages in amounts over $15,000, the required no-fault coverage level under the Pennsylvania No-Fault Act (and thus the point above which tort liability is preserved). Since the No-Fault Act provides for unlimited coverage of medical expenses, the government would be unable to recover any amount of FECA compensation it has paid for such expenses.

> ficiary * * * shall refund to the United States the amount of compensation paid * * *.

The Act unequivocally provides that when a FECA beneficiary has suffered an injury for which a third party is legally liable to pay damages, and the beneficiary recovers "money or other property" in satisfaction of that liability, the beneficiary must (after making certain deductions) apply that recovery to reimburse the compensation fund for the amount of FECA benefits received. Section 8132 does not indicate that the employee's duty to reimburse depends on whether the third-party recovery includes damages for medical expenses and lost wages. As the Sixth Circuit noted in *Ostrowski*, "[t]here is no language in Section 8132 delineating two classes of damages—one of which gives rise to a duty to reimburse and one of which does not. On the contrary, by its terms the duty to reimburse encompasses all damages recovered from third parties." 653 F.2d at 230, quoting 479 F. Supp. at 208.[8]

The legislative history of the FECA also does not suggest that Congress intended to require employees to reimburse the compensation fund only from amounts representing damages for medical expenses and lost wages. The predecessor of 5 U.S.C. 8132 was enacted in 1916, long before the advent of state no-fault statutes. But even then Congress recognized that the right of reimbursement would exist in the case of third-party recoveries with noneconomic components, such as puni-

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[8] The court of appeals here failed to note that the language of 5 U.S.C. 8132 differs from that of the reimbursement provision of the Medical Care Recovery Act, 42 U.S.C. 2651(a), construed by that court in *Heusle* v. *National Mutual Insurance Co.*, 628 F.2d 833 (1980). Section 2651(a) refers to reimbursement from a third-party tort recovery of "damages therefor," a term the court in *Heusle* thought referred back to expenses for medical care, mentioned earlier in Section 2651(a). 628 F.2d at 837. We believe that the court in *Heusle* misconstrued Section 2651(a), but that in any event *Heusle* is distinguishable from this case because of the difference in wording of the FECA provision.

tive damages and "damages brought about by reason of mental pain and suffering." 53 Cong. Rec. 10909-10910 (1916) (remarks of Rep. Barkley). Congress surely was aware that there would be cases in which the government would not receive the full amount of benefits paid unless its right of reimbursement extended to the non-economic components of damages, perhaps because an employee would be unsuccessful in persuading a jury of the full measure of his economic losses, because his recovery was reduced based on the doctrine of comparative negligence, or because he settled for less than the full amount of his claim.

Reimbursement of the United States from an employee's third-party recovery, whether or not it includes damages for economic losses, is consistent with the purposes underlying 5 U.S.C. 8132. The court of appeals itself recognized (App. A, *infra*, 5a) that a major purpose of the reimbursement provision is to keep the compensation fund solvent and to minimize the overall cost of the FECA program.[9] That purpose clearly is served by requiring reimbursement from any element of an employee's damages award. The reimbursement provision also facilitates administration of the FECA program. As the district court in *Ostrowski* explained (479 F. Supp. at 205), "by having only one standard for establishing the obligation to reimburse, Congress has eased the burden of administering FECA by avoiding the difficulties of distinguishing between the numerous statutory and common law causes of action found in the various states." Application of a uniform federal reimbursement requirement is certainly less burdensome than interpretation of the FECA reimbursement provision to accommodate each variation of no-fault law on a state-by-state basis. See pages 8-10, *supra*.

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[9] See also *Dahn* v. *Davis*, 258 U.S. 421, 430 (1922); *Galimi* v. *Jetco, Inc.*, 514 F.2d 949, 953 & n.4 (2d Cir. 1975); *Ostrowski* v. *Dep't of Labor, OWCP*, 653 F.2d at 231.

The court of appeals found it significant that a third purpose of the reimbursement provision—prevention of double recovery by FECA beneficiaries—would not mandate reimbursement in the circumstances of this case (App. A, *infra*, 7a-8a). But the court recognized that Congress allowed the government to calculate reimbursement in light of an employee's total recovery in order to avoid confusion about the portion of an award or settlement figure that would be allocated to medical expenses and lost wages, as opposed to pain and suffering, and that courts had permitted reimbursement from all parts of an employee's damages award prior to the advent of no-fault statutes. See *id.* at 6a.[10] Thus, the court of appeals implicitly acknowledged that the gov-

[10] Prior to the no-fault cases, the only federal court that had addressed an argument that reimbursement under the FECA does not extend to portions of a recovery that represent non-economic losses had rejected the argument. In *United States* v. *Hayes*, 254 F. Supp. 849 (W.D. Ky. 1966), cited by the court of appeals (App. A, *infra*, 6a), the employee contended that his settlement with a third-party tortfeasor represented only damages for pain and suffering. The court stated that the language of the provision (then 5 U.S.C. 777) "is clear and unambiguous, and makes no provision for the segregation or division of damages." 254 F. Supp. at 851.

The courts have reached the same result in interpreting the reimbursement provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. V) 933. See, *e.g.*, *Haynes* v. *Rederi A/S Aladdin*, 362 F.2d 345, 350 (5th Cir. 1966), cert. denied, 385 U.S. 1020 (1967); *Ballwanz* v. *Jarka Corp.*, 382 F.2d 433, 436-437 (4th Cir. 1967); *Chouest* v. *A&P Boat Rentals, Inc.*, 321 F. Supp. 1290, 1292-1293 (E.D. La. 1971), rev'd on other grounds, 472 F.2d 1026 (5th Cir.), cert. denied, 412 U.S. 949 (1973). Under state workers' compensation statutes, the prevailing rule (in the absence of any express provision to the contrary) permits workers' compensation carriers to seek reimbursement from the entire judgment recovered by an employee, whether or not part of the judgment represents damages for pain and suffering. See 2A A. Larson, *Workmen's Compensation Law* § 74.35, at 14-474 to 14-479 (1982), and cases cited therein.

ernment's right to reimbursement is not necessarily dependent on the need to avoid double recovery in a given situation.

The Secretary of Labor has long construed 5 U.S.C. 8132 to require reimbursement of the FECA compensation fund from any third-party recovery, regardless of the elements of damages that make up the recovery. The Secretary's regulation, 20 C.F.R. 10.503, promulgated to implement the reimbursement provision, provides that all damages a beneficiary recovers on account of an injury are available for reimbursement of the fund. That construction by the official responsible for administration of the FECA is entitled to considerable deference. See *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, No. 81-1891 (May 24, 1983), slip op. 10; *Miller* v. *Youakim*, 440 U.S. 125, 144 & n.25 (1979); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

b. The reasoning of the court of appeals in support of its construction of 5 U.S.C. 8132 cannot withstand scrutiny. The court in effect concluded that the reimbursement provision must be read out of the FECA in cases like this one in order to accommodate the operation of the Pennsylvania no-fault scheme. The court of appeals explained that it rejected the Secretary's interpretation of 5 U.S.C. 8132 "[i]n light of the recent growth of no-fault laws throughout the country and in view of the inherent hardship that will evolve upon those federal employees who, per chance, are subject to no-fault statutes" (App. A, *infra*, 7a).

The court of appeals' "reinterpretation" of the FECA is at odds with this Court's admonition that comprehensive federal statutory compensation schemes are "not to be judicially expanded because of 'recent trends.'" *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, slip op. 11, quoting *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 279 (1980). In *Morrison-Knudsen*, the Court rejected the contention that employer contributions to union trust funds should be considered "wages" for purposes of computing com-

pensation benefits under Section 2(13) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 902(13). Although the Court recognized that such fringe benefits have come to constitute a significant percentage of compensation costs, it nevertheless held that alteration of the reasonable expectations of employers and their insurers is "a task for Congress." *Morrison-Knudsen*, slip op. 12, citing *J.W. Bateson Co.* v. *United States ex rel. Board of Trustees*, 434 U.S. 586, 593 (1978). The Court noted that the LHWCA "was designed to strike a balance between the concerns of the longshoremen and harborworkers on the one hand, and their employers on the other" and that reinterpretation of the term "wages" would significantly "alter the balance achieved by Congress." *Morrison-Knudsen*, slip op. 11. Likewise, the reimbursement provision plays a significant role in the balance Congress created under the FECA, and any "reinterpretation" of that provision to accommodate recent no-fault trends is the responsibility of Congress.

There is no support for the court of appeals' conclusion (App. A, *infra*, 8a) that Congress intended the result the court reached. The court of appeals cited a passage from the legislative history of the 1974 amendments to the FECA, in which the Senate committee indicated that enactment of those amendments would help the government achieve the position of "a model employer." S. Rep. 93-1081, 93d Cong., 2d Sess. 2 (1974), cited in App. A, *infra*, 8a.[11] But that rhetorical statement hardly suffices to support the conclusion that a court (as opposed to Congress) should revise the FECA to remedy what it perceives as an unfair result

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[11] The court of appeals appears to have erred in citing the Senate report. The court referred to "S. Rep. No. 1124, 93rd Cong., 1st Sess., *reprinted in* (1974) U.S. Code Cong. & Ad. News 5341." App. A, *infra*, 8a. However, it is S. Rep. 93-1081 that is reproduced at page 5341 of 1974 U.S. Code Cong. & Ad. News.

of the operation of the federal statute in the context of a state no-fault scheme. Congress itself did not choose in 1974 to eliminate the reimbursement provision in connection with automobile accidents in no-fault states, despite the fact that a number of no-fault statutes had been enacted by that time.[12] Rather, Congress chose a more general approach to the problem of potential unfairness that employees might experience as a result of reimbursement. In order to mitigate any such unfairness, Congress amended 5 U.S.C. 8132 to provide that a FECA beneficiary is entitled to retain at least one-fifth of any net tort recovery (following deduction for costs and attorney's fees).[13] That amendment presumably was meant to remedy all sorts of unfairness, including any that might result from the operation of state no-fault laws; it seems quite inappropriate for the court of appeals to have invoked the legislative history of that amendment as support for creation of a different remedy.

It should be noted that, to the extent there is any unfairness to federal employees in cases like this one, it results not from the FECA reimbursement provision, which predates by more than half a century all state no-fault schemes, but from the operation of the state laws themselves. As the district court in *Ostrowski* stated (479 F. Supp. at 206):

> Any discrepancy between the net recovery of an employee whose injury is covered by a no-fault statute and an employee whose injury is covered by common law or statute using only traditional tort concepts results not from a classification made

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[12] By 1974, no-fault statutes had been enacted in Colorado, Connecticut, Florida, Hawaii, Massachusetts, Michigan, New Jersey, New York, and Utah.

[13] The question of respondent's retention of one-fifth of the net tort recovery does not even arise in this case, since the federal government is seeking reimbursement of only a small percentage of respondent's settlement.

> by the Congress in FECA, but rather from the decisions of the individual states regarding the proper means of compensating personal injuries.

Of course, states are free to change the relationships among various parties subject to state control, but they clearly cannot directly alter the rights of the federal government under a federal statute without running afoul of the Supremacy Clause of the Constitution, Art. VI, Cl. 2. It is likewise inappropriate for the courts to justify reading a provision out of a federal statute on the ground that a subsequently-enacted state statute does not mesh perfectly with the federal statutory scheme, as the court of appeals did here.[14] Any alteration of the FECA reimbursement provision to accommodate the effects of state no-fault schemes is a task for Congress alone.

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[14] In the absence of congressional action, any accommodation must be made through interpretation or alteration of *state* law. See, *e.g.*, *Perez* v. *Campbell*, 402 U.S. 637, 649-650 (1971); *Sperry* v. *Florida*, 373 U.S. 379, 384 (1963). Here, the Pennsylvania no-fault statute might reasonably be construed by the state courts not to require deduction of benefits paid under FECA (or other programs with mandatory repayment provisions over which the state has no control) from the no-fault insurers' obligation, to the extent the federal statute requires reimbursement from third-party recoveries for noneconomic losses. See *Ostrowski* v. *Roman Catholic Archdiocese*, 479 F. Supp. at 206.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
*Solicitor General*
J. PAUL MCGRATH
*Assistant Attorney General*
KENNETH S. GELLER
*Deputy Solicitor General*
CAROLYN F. CORWIN
*Assistant to the Solicitor General*
WILLIAM KANTER
FREDDI LIPSTEIN
*Attorneys*

NOVEMBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 82-1683

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LORENZETTI, PAUL B.

*Appellant*

*vs.*

UNITED STATES OF AMERICA

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D.C. Civil No. 82-1666

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Argued April 28, 1983

Before: WEIS, HIGGINBOTHAM, *Circuit Judges*, and BROTMAN,* *District Judge*

Opinion filed June 22, 1983

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## OPINION OF THE COURT

BROTMAN, *District Judge:*

1. This case arises under the Federal Employment Compensation Act, 5 U.S.C. § 8101 *et seq.* (FECA). It is an action for a declaratory judgment brought by Paul B. Lorenzetti against the United States. The dispute stems from an unresolved conflict regarding the gov-

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*Hon. Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

ernment's right to reimbursement under the FECA and the injured party's ability to recover damages under the Pennsylvania no-fault statute, Pa. Stat. Ann. tit. 40, §1009.101 *et seq.* (Purdon 1974). The district court held that Lorenzetti was required to reimburse the government even though he had no third party cause of action for medical expenses and wage loss, exactly the items for which the government was responsible under FECA. *See* 5 U.S.C. §8132. The underlying issue is relatively straightforward—does §8132 compel a government employee who has received benefits under FECA to reimburse the government, even in cases where the beneficiary of such coverage is barred by state law from including in his third party action for damages medical expenses and wage loss?

2. The facts of this case are undisputed. Appellant Paul Lorenzetti, an FBI agent and government employee, was injured in an automobile accident on November 21, 1977. He suffered extensive injuries and was forced to miss work for several days. Pursuant to the provisions of FECA, the federal government immediately reimbursed appellant for all medical expenses and lost wages arising out of the accident. The total amount came to $1600.24.

3. Following the accident, appellant instituted a third party action for damages against the driver of the car with which he collided. At the outset of the lawsuit the defense moved to bar any evidence relating to medical expenses or wage losses, predicating the motion on the recently enacted Pennsylvania no-fault statute which precludes recovery on those grounds in any third party action.[1] As a result, appellant's damage claim was

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[1] The Pennsylvania No-Fault Motor Vehicle Insurance statute, Pa. Stat. Ann. tit. 40, § 1009.101 *et seq.* (Purdon 1974), reads in pertinent part as follows:

reduced to items of pain and suffering. He ultimately settled the case for $8500.00.

4. During the course of the third party action, the government appeared in the proceeding and asserted a subrogation lien against any recovery accruing to plaintiff. The government conceded, and the district court agreed, that the settlement was attributed solely to plaintiff's claim for pain and suffering. Nonetheless, the government still maintained that it was entitled to full reimbursement for its expenditures on Lorenzetti's behalf, pursuant to § 8132.[2] Appellant, on the other hand, refused to comply with the government's request, arguing that because he was barred from recovering dam-

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> Tort liability is abolished with respect to any injury that takes place in the State in accordance with the provisions of this Act if such injury arises out of the maintenance or use of a motor vehicle, except that:
>
> (5) A person remains liable for damages for noneconomic detriment (pain, suffering, inconvenience, physical impairment, and other nonpecuniary damage ... § 1009.103 if the accident results in:
>
> (B) the reasonable value of reasonable and necessary medical and dental services ... in excess of $750 ...

Pa. Stat. Ann. tit. 40, § 1009.301(a)(5).

[2] The government concedes that under FECA appellant can deduct the portion of that amount which was used to pay his attorney's fees—in this case approximately $500.00. FECA reads in relevant part:

> If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary entitled to compensation from the United States for that injury receives money or other property in satisfaction of that liability as the result of suit, or settlement by him or in his behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States and credit any surplus on future payments of compensation payable to him for the same injury.

5 U.S.C. § 8132.

ages for medical expenses and lost earnings, he should not be required to reimburse the government for its expenditures for those items.

5. There is little argument as to the operation of this statute in most instances. The federal employee, if injured during the performance of his duties, is immediately entitled to payment for all related medical bills and is compensated for lost earnings. If he recovers damages as a result of that accident, the injured party must reimburse the government for its costs. *See e.g., United States v. Crystal*, 39 F. Supp. 220 (N.D. Ohio 1941). Typically, the refund will be subtracted from the employee's total damage award, regardless of whether the net amount allocated to medical expenses equals the cost incurred by the government with respect thereto. *See United States v. Hayes*, 254 F. Supp. 849 (W.D. Ky. 1966). The dispute in the instant action arises solely because Pennsylvania, the state in which the accident occurred, has recently passed a no-fault statute which bars an injured party from suing for medical expenses and/or lost wages. Pa. Stat. Ann. tit. 40, §1009.101 *et seq.* As a result of this bar, appellant was limited to an action exclusively for pain and suffering—he had no legal cause of action for other damages which may have resulted from the accident.

6. The government argues that § 8132 of FECA requires appellant to reimburse it for any expenses it incurred on his behalf. In this instance reimbursement is sought because the government contends that appellant did recover damages resulting from a legal liability created under the circumstances which led to the government's initial responsibility. 5 U.S.C. §8132. The district court concurred with the government's position and in doing so, it relied heavily on the reasoning employed by the court in *Ostrowski v. Roman Catholic Archdiocese, etc.*, 479 F. Supp. 200 (E.D. Mich. 1979), *aff'd* 653 F.2d 229 (6th Cir. 1981). After discussing the

language of the statute itself and noting the legislatively authorized interpretation rendered by the Secretary of Labor, 20 C.F.R. §10.503, the court in *Ostrowski* concluded that any damages recovered by the employee were subject to a government lien. *Id.* at 204. For the following reasons we reject the holding in *Ostrowski* and therefore, reverse the decision of the district court in the instant case.

7. The Federal Employment Compensation Act was enacted in 1916. The primary purpose of the law was to create a compromise: "the 'quid pro quo'—commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate fixed benefits regardless of fault and without need for litigation, but in return they lose the right to sue the Government." *Lockheed Aircraft Corp. v. United States*, 51 U.S.L.W. 4206, 4207 (February 23, 1983); *see also* H.R. Rep. No. 729, 81st Cong., 1st Sess. 14-15 (1949); S. Rep. No. 836, 1st Sess. 23 (1949). Recently, when it was amending the statute, Congress clarified the purpose behind the law, explaining that "the Federal Government should strive to attain the position of being a model employer." S. Rep. No. 1124, 93rd Cong., 1st Sess. *reprinted in* (1974) U.S. Code Cong. & Ad. News 5341. As such, it becomes quite evident that the statute was promulgated in an effort to assist the federal employee and to encourage able individuals to work for the government by providing favorable benefits.

8. The specific provision of the statute at issue in this action, 5 U.S.C. § 8132, was originally enacted for two basic purposes. First and foremost, Congress inserted §8132 in an effort to prevent an employee from recovering twice for the same injury. Pub. L. No. 267, §27, 39 Stat. 747-48 amended to 5 U.S.C. §8132 (1967). The other purpose behind the reimbursement section, was to keep the fund solvent and minimize the cost of the program. *See Ostrowski v. Roman Catholic Archdio-*

*cese, supra* at 205. Both of these objectives are advanced by the requirement set forth in §8132 that any employee who has been compensated by the government pursuant to FECA must subrogate his rights against a third party tort-feasor or reimburse the government for its past and future costs after receiving a damage award from the third party. 5 U.S.C. §8132.

9. Although the intent behind the statutory scheme is obvious, the scope of the reimbursement provision is less clear. When drafting the law, Congress recognized that third party judgments would often include monetary awards for losses other than medical expenses and lost wages. As a result, the statute was structured in such a manner as to allow the government to calculate the amount needed for reimbursement in light of the total recovery. *United States v. Hayes, supra.* The reason for lumping together all potential damages was to avoid further confusion as to the portion of an award or settlement figure which would be allocated exclusively to medical expenses and loss of wages, and that percentage attributable to other items such as pain and suffering. *See Ostrowski v. Roman Catholic Archdiocese, supra* at 206. In this instance both parties agree that the damages were solely compensation for appellant's pain and suffering. The government, however, seeks to reach into that award in order to obtain the desired reimbursement and in doing so, reads further into the statute than originally intended by Congress.

10. Unfortunately, §8132 was passed prior to the enactment of no-fault statutes and therefore does not speak to this situation. "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look at the provisions of the whole law, and to its object and policy." *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). Obviously, since the concept of no-fault insurance was not cognizable at the time the statute was drafted, Congress could not have anticipated

this scenario. If, as in this case, the problem is one that Congress could not have considered, this court is obligated to analyze the purposes underlying the statute in order to determine its proper scope. *Rose v. Lundy*, 455 U.S. 509, 517 (1982).

11. When it last amended FECA in 1973, Congress explicitly stated that it intended the law to insure "that injured or disabled employees of all covered departments or agencies ... be treated in a fair and equitable manner." S. Rep. No. 416, 93rd Cong., 1st Sess., *reprinted in* (1974) U.S. Code Cong. & Ad. News 5341-43. The result now sought by the government converts a law which was originally intended to assist federal employees into one that is manifestly unfair to those same individuals. In light of the recent growth of no-fault laws throughout the country and in view of the inherent hardship that will evolve upon those federal employees who, per chance, are subject to no-fault statutes, it is incumbent on this court to reject the government's wide-ranging interpretation of §8132.

12. Moreover, requiring reimbursement under these circumstances does little to further the legislative purpose behind § 8132. Obviously, appellant cannot recover twice for the same loss since he is barred from bringing a third party action for medical expenses and lost earnings. In fact, because of his recovery under FECA, he is precluded from recovering any benefits to which he may have been entitled under no-fault insurance. 5 U.S.C. §8116(c); Pa. Stat. Ann. tit. 40, §1009.106(a). Nor is the intent to foster administrative ease advanced by the application of §8132 in this instance. Congress was troubled by the potential abuse that could occur if reimbursement was only deducted from the portion of the award allocated to medical expenses and wage loss. *See Ostrowski v. Roman Catholic Archdiocese*, *supra* at 205. The court in *Ostrowski* noted the problem, especially in settled cases, where parties would allocate a

disproportionate percentage of the award to pain and suffering. In this manner they would circumvent their obligation to reimburse the government. This problem would not exist in situations involving no-fault statutes since the injured party is completely barred from suing for any medical expenses incurred and therefore the only compensatory damages to which he is entitled are those resulting from his pain and suffering. Pa. Stat. Ann. tit. 40, §1009.301.

13. Another purpose of FECA, as pointed out earlier in this opinion, was Congress' hope that the law would help the federal government achieve its goal of becoming a "model employer." *See* S. Rep. No. 1124, 93rd Cong., 1st Sess. [*sic*], *reprinted in* (1974) U.S. Code Cong. & Ad. News 5341. In a realistic sense FECA is the government's answer to Workman's Compensation, *see* 5 U.S.C. §8107 (we note with interest that Workman's Compensation was first enacted in Pennsylvania three years prior to the passage of the FECA.), Pa. Stat. ann. tit. 77, §1 et seq. (1913). It should follow, therefore, that federal employees would be treated at least as well as their counterparts in private firms who are covered by Workman's Compensation. Under the proposed government interpretation, however, federal employees would be treated in a harsher manner than private workers who are covered by Pennsylvania Workman's Compensation law. In similar situations arising under Workman's Compensation, injured employees can institute a third party action for noneconomic detriment (pain and suffering) just as appellant did in the instant case. The difference, however, is that the Workman's Compensation statute does not require the successful party to reimburse the carrier for any expenditures made on his behalf, Pa. Stat. Ann. tit. 77, §736.

14. The rationale used by Pennsylvania courts when interpreting §736 of the Workman's Compensation

statute, is as follows: "[since] the Pennsylvania No-fault Act has drastically altered the legal liabilities created in a motor accident," *Pierce v. Kinsey*, 18 D&C 531, 536 (Pa. Comm. Pl. 1981), the Workman's Compensation carriers cannot be subrogees for money paid in a tort action covering noneconomic loss. *See Brunelli v. Farelly Bros.*, 402 A.2d 1058, 1061 (Pa. Super. Ct. 1979).[3] To permit subrogation by the intervenor insurance company for recovery of basic losses paid to plaintiffs under Workmen's Compensation payments would preclude recovery of the uneconomic losses suffered by plaintiffs." *Pierce v. Kinsey*, *supra* at 540. There is absolutely no reason in either the legislative history of FECA or in the interpretive regulations promulgated by the Secretary of Labor, as to why FECA cannot be viewed in an analogous fashion. Such a reading of §8132 would put federal employees on an equal footing with their counterparts in private industry and most importantly, it would allow for a fair result under the terms of the statute.

15. Finally, we are guided by this court's action when recently confronted with a similar statutory problem in *Heusle v. National Mutual Insurance Co.*, 628 F.2d 833 (3d Cir. 1980). The court in *Heusle* was faced with the issue of whether the no-fault carrier should be substituted for the actual tort feasor, so the government could recover against the insurer under §2651 of the Medical Care Recovery Act [MCRA]. *See generally*

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[3] This reasoning is analogous to that used by this court in its interpretation of the Medical Care Recovery Act (MCRA). 42 U.S.C. § 2651 (1976). *See Heusle v. National Mutual Insurance Co.*, 628 F.2d 833 (1980), (*see* discussion of *Heusle*, *infra*). The court in *Pierce*, however, focused on the crux of the problem, stating that "the real reason that the victim cannot subrogate himself for a second helping of basic loss benefits is not based on tort or contract concepts but on *unjust enrichment.*" *Pierce v. Kinsey*, *supra* at 537, n.2.

42 U.S.C. §2651-2653 (1976). Wording used in the provision permitting reimbursement under MCRA[4] is analogous to language used in §8132 of FECA. In analyzing MCRA, Judge Weis noted that the question of liability on the part of the third party tort feasor was ultimately determined by reference to the Pennsylvania no-fault statute. He then concluded "since there was 'no tort liability upon some person . . . to pay damages' for medical expense, then there was no claim in tort to which the United States could be subrogated under MCRA."[5]

---

[4] Section 2651(a) reads in pertinent part:

> In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical or dental care and treatment . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefor, the United States shall have the right to recover from said third person . . . 42 U.S.C. § 2651(a).

[5] Section 8132 of FECA speaks in terms of "legal liability" rather than tort liability, however this decision does not rest on that language. Moreover, in the instant action, we turn to the regulations promulgated by the Secretary of Labor, regulations which have a binding effect on this court. *See* 5 U.S.C. § 8149. The regulations, in relevant part, read as follows:

> "if any injury for which benefits are payable under the Act is caused under circumstances creating a legal liability upon some person other than the United States to pay damages *therefor*, . . ."

20 C.F.R. § 1053 (emphasis added). One way of reading those regulations as they relate to the instant situation, is that appellant had no legal cause of action against a third party with respect to "the injury for which benefits are payable," namely medical expenses and lost earnings. *See* Pa. Stat. Ann. tit. 40 § 1009.301(a)(5) (Purdon Supp. 1980). In other words, the Pennsylvania law has impliedly created two separate causes of action; one for "basic economic loss" (as defined in § 1009.103) and another for "noneconomic detriment." (*See* § 1009.103.) Since appellant is barred from asserting the first cause of action, it follows naturally that the government must be precluded from recovering any expenditures made thereto. *See Heusle v. National Mutual Insurance Co., supra.* As such, the court would have no power under FECA to compel reimbursement based on the facts of this case.

*Heusle v. National Mutual Insurance Co.*, *supra* at 837. In a companion case, *Hohman v. United States*, [6]28 F.2d 832, 833 (3d Cir. 1980), this court went even further, holding that the government's right of subrogation applies only to medical expenses and because none of the money recovered represents compensation for medical expenses, "the United States has no claim to any part of that fund." Both *Heusle* and *Hohman* clearly indicate that the courts must recognize the impact of state no-fault laws and interpret federal compensation statutes accordingly. As such, the reimbursement provision of FECA must be construed in such a fashion as to allow a fair and equitable result for the intended beneficiary of the statute—the injured federal employee.

16. For the reasons stated in this opinion, this court finds that appellant is not required to reimburse the government for expenditures made pursuant to its obligation under 5 U.S.C. §8101 *et seq.* (FECA). The decision rendered by the district court is hereby reversed.

A True Copy;
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1683

LORENZETTI, PAUL B., APPELLANT

*v.*

UNITED STATES OF AMERICA

(D.C. CIVIL No. 83-1666)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Present: WEIS and HIGGINBOTHAM, *Circuit Judges;* and BROTMAN, *District Judge.**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on April 28, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 8, 1982, be, and the same is hereby reversed. Costs taxed against appellee.

ATTEST:

/s/ Sally Mrvos

SALLY MRVOS
*Clerk*

JUNE 22, 1983

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*Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OCTOBER 8, 1982

Civil Action
No. 82-1666

PAUL B. LORENZETTI

*v.*

UNITED STATES OF AMERICA

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MEMORANDUM AND ORDER

BECHTLE, J.

This is an action in which plaintiff seeks a determination that the United States may not assert a lien under the Federal Employees' Compensation Act for benefits previously paid to plaintiff, against plaintiff's recovery in a third party action. Presently before the Court are cross-motions for summary judgment. For the reasons which follow, defendant United States' motion will be granted and plaintiff's motion will be denied.

I.

In November, 1977, plaintiff Paul B. Lorenzetti was injured in an automobile accident in Pennsylvania in the course of and arising out of his employment with the federal government. Pursuant to the Federal Employees' Compensation Act, 5 U.S.C. §8101 *et seq.* (FECA), plaintiff received compensation benefits from the Federal Employees' Compensation Fund (Fund) for his medical expenses and lost wages.[1]

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[1] Benefits paid to the plaintiff by the Fund amounted to $1,600.24. After deduction of an allowance for attorney's fees under 5 U.S.C. § 8132, the parties agree that the amount at issue here is $1,044.38.

Subsequently, plaintiff initiated a civil action in state court against the driver of the automobile alleged to have caused the accident. Plaintiff sought damages for pain and suffering, medical expenses, and loss of earnings. Prior to trial, however, the defendant in that action correctly concluded that in view of the Pennsylvania No-Fault Act, Pa. Stat. Ann. tit. 40, §1009 *et seq.* (Purdon Supp. 1982-1983) (No-Fault Act), plaintiff was precluded from holding defendant liable for the $1,600.24 for medical expenses and lost wages which had been paid to plaintiff by the Fund under FECA. Thus, had the case gone to trial, plaintiff's proof of damages would have been limited to non-economic losses as defined by the No-Fault Act. The parties settled the case, however, for $8,500.00. In view of the applicable provisions of the No-Fault Act, the settlement must be attributed solely to plaintiff's claim for pain and suffering.

II.

Section 8132 of FECA requires that employees who recover damages from third parties for employment-related injuries compensable from the Fund reimburse the Fund out of their third party recovery. In the present action plaintiff seeks a declaratory judgment that the United States may not require reimbursement of the Fund out of plaintiff's third party settlement since the settlement is exclusively attributable to pain and suffering, a cause for which plaintiff received nothing under FECA.

Plaintiff relies on *Heusle* v. *National Mutual Insurance Co.*, 628 F.2d 833 (3d Cir. 1980), a case decided under the Federal Medical Care Recovery Act, 42 U.S.C. §§2651-2653 (MCRA). In *Heusle*, a member of the armed forces was injured in an automobile collision and pursuant to MCRA received payments from the United States for medical expenses. The United States sought reimbursement from the injured service mem-

ber's no-fault carrier pursuant to the MCRA's subrogation provision which provides in pertinent part:

> In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care ... to a person who is injured ... *under circumstances creating a tort liability upon some third person* ... to pay damages therefore, the United States shall have a right to recover from said third person....

42 U.S.C. §2651(a) (emphasis added).

In denying the United States' claim, the Third Circuit held that the United States was not entitled to recover, either from the tort-feasor or from the injured party's insurance carrier, the medical costs which the United States had disbursed to the injured party since the Pennsylvania No-Fault Act had abolished tort liability as a means of recovering the cost of medical expenses. Plaintiff in the present action seeks a similar interpretation of Section 8132 of FECA. That is, that like the MCRA, the FECA only requires government reimbursement to the extent that a third party recovery is attributable to the same type of benefits received under FECA. Based on such an interpretation of Section 8132, plaintiff argues that he is excused from the duty to reimburse the Fund out of his settlement award because under the Pennsylvania No-Fault Act tort actions in this state are limited to recovery of non-economic losses, and non-economic losses were not part of the benefits received under FECA.

The United States, on the other hand, resists plaintiff's interpretation of Section 8132. It adopts the view that plaintiff must reimburse the Fund to the extent of *any* damages paid by a third party to discharge a legal liability arising from the same injury, irrespective of the nature of those damages. As authority for its position, the United States cites *Ostrowski v. Roman Catholic Archdiocese of Detroit*, 653 F.2d 229 (6th Cir.

1981), affirming 479 F. Supp. 200 (E.D. Mich. 1979), wherein the precise question raised by the parties here was addressed by the Sixth Circuit. In the face of a state no-fault law similar to Pennsylvania's, the *Ostrowski* court interpreted Section 8132 to require plaintiffs to reimburse the Fund for economic benefits paid them under FECA out of damages awarded in a state court tort action against third parties for *non-economic* losses, i.e., pain and suffering. *Ostrowski* held that the modification in Michigan tort law caused by the adoption of a no-fault automobile insurance system did not prohibit the United States from obtaining reimbursement under Section 8132 of FECA. In reaching its conclusion, the court reviewed the language of Section 8132, which provides in pertinent part:

> If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary ... receives money or other property in satisfaction of that liability ... the beneficiary ... shall refund to the United States the amount of compensation paid....

5 U.S.C. §8132.

As the district court in *Ostrowski* observed, *Ostrowski* v. *Roman Catholic Archdiocese of Detroit*, 479 F. Supp. 200, 203 (E.D. Mich. 1979), *aff'd* 653 F.2d 229 (6th Cir. 1981):

> There is no language in Section 8132 delineating two classes of damages—one of which gives rise to a duty to reimburse and one of which does not. On the contrary, by its terms the duty to reimburse encompasses all damages recovered from third parties.

*Id.*

In response to the United States' citation of *Ostrowski*, plaintiff Lorenzetti contends that this Court is bound by the Third Circuit's determination in

*Heusle*. The Court disagrees and declines to follow *Heusle* for the simple reason that the right of subrogation considered by the Third Circuit in that case under the Medical Care Recovery Act, is both different and narrower than the Federal Employees' Compensation Act right of reimbursement at issue here.

Plaintiff's argument that there is no meaningful distinction between the applicable "reimbursement" provisions of the two statutes ignores the fact that Congress chose to draft the provisions differently. FECA provides that the government shall be reimbursed, "If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a *legal liability* in [a third party] ... to pay damages, ... [and the injured person] receives money or other property in satisfaction of that liability...." 5 U.S.C. §8132 (emphasis added). In contrast, MCRA allows the government a right of subrogation against a third person as follows:

> In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment ... to a person who is injured ... under circumstances creating a *tort liability* upon some third person ... to pay damages therefore,....

42 U.S.C. §2651(a) (emphasis added).

As a comparative reading of the two statutes clearly indicates, the government's recovery under FECA is all inclusive and is not limited to circumstances of tort liability. Moreover, additional support for a broad reading of the FECA reimbursement provision is found in the plain language of that provision's regulations, 20 C.F.R. §10.503, as well as its legislative history.[2]

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[2] The original Act, adopted in 1916, contained a reimbursement provision indistinguishable from 5 U.S.C. §8132. *See* Pub. L. No. 267, §27, 39 Stat. 747-748. The Congressional debates on Section 27 show that Congress was aware that third party re-

III.

In conclusion, this Court agrees with the well reasoned decision in *Ostrowski*, and holds that all FECA beneficiary recoveries from third parties give rise to a duty to reimburse the government irrespective of the nature of those third party recoveries. Thus, plaintiff's $8,500.00 settlement recovery in the third party action, which arose out of the same injuries for which plaintiff received FECA benefits, entitled the United States to reimbursement.

An appropriate Order will be entered.

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coveries would often include non-economic components such as pain and suffering, yet Congress made no attempt to shield these elements from the duty to reimburse. 53 Cong. Rec. 10909-10910 (July 12, 1916) (remarks of Rep. Barkley).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OCTOBER 8, 1982

Civil Action
No. 82-1666

PAUL B. LORENZETTI

*v.*

UNITED STATES OF AMERICA

---

ORDER

AND NOW, TO WIT, this 8th day of October, 1982, for the reasons stated in the foregoing Memorandum, IT IS ORDERED as follows:

1. Defendant's motion for summary judgment is *granted* and plaintiff's cross-motion for summary judgment is *denied*;

2. Plaintiff is ordered to satisfy the lien of defendant United States of America in the amount of $1,600.24 pursuant to 5 U.S.C. §8132;

3. Judgment is *entered* in favor of defendant United States of America and against plaintiff Paul B. Lorenzetti.

/s/ Louis C. Bechtle
LOUIS C. BECHTLE, J.

## APPENDIX E

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Supremacy Clause of Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Federal Employees' Compensation Act, 5 U.S.C. 8131, provides:

> (a) If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability on a person other than the United States to pay damages, the Secretary of Labor may require the beneficiary to—
>
> (1) assign to the United States any right of action he may have to enforce the liability or any right he may have to share in money or other property received in satisfaction of that liability; or
>
> (2) prosecute the action in his own name.
>
> An employee required to appear as a party or witness in the prosecution of such an action is in an active duty status while so engaged.
>
> (b) A beneficiary who refuses to assign or prosecute an action in his own name when required by the Secretary is not entitled to compensation under this subchapter.
>
> (c) The Secretary may prosecute or compromise a cause of action assigned to the United States. When the Secretary realizes on the cause of action, he shall deduct therefrom and place to the credit of

the Employees' Compensation Fund the amount of compensation already paid to the beneficiary and the expense of realization or collection. Any surplus shall be paid to the beneficiary and credited on future payments of compensation payable for the same injury. However, the beneficiary is entitled to not less than one-fifth of the net amount of a settlement or recovery remaining after the expenses thereof have been deducted.

(d) If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in the Panama Canal Company to pay damages under the law of a State, a territory or possession of the United States, the District of Columbia, or a foreign country, compensation is not payable until the individual entitled to compensation—

(1) releases to the Panama Canal Company any right of action he may have to enforce the liability of the Panama Canal Company; or

(2) assigns to the United States any right he may have to share in money or other property received in satisfaction of the liability of the Panama Canal Company.

The Federal Employees' Compensation Act, 5 U.S.C. 8132, provides:

If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as the result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of com-

pensation payable to him for the same injury. No court, insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States. The amount refunded to the United States shall be credited to the Employees' Compensation Fund. If compensation has not been paid to the beneficiary, he shall credit the money or property on compensation payable to him by the United States for the same injury. However, the beneficiary is entitled to retain, as a minimum, at least one-fifth of the net amount of the money or other property remaining after the expenses of a suit or settlement have been deducted; and in addition to this minimum and at the time of distribution, an amount equivalent to a reasonable attorney's fee proportionate to the refund to the United States.

20 C.F.R. 10.503 provides:

If an injury for which benefits are payable under the Act is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, and, as a result of suit brought by the beneficiary or by someone on his or her behalf, or as a result of settlement made by him or her or on his or her behalf in satisfaction of the liability of such other person, the beneficiary shall recover damages or receive any money or other property in satisfaction of the liability of such other person on account of such injury or death, the proceeds of such recovery shall be applied as follows:

(a) If an attorney is employed, a reasonable attorney's fee and cost of collection, if any, shall first be deducted from the gross amount of the settlement;

(b) The beneficiary is entitled to retain one-fifth of the net amount of the money or other property remaining after the expenses of a suit or settle-

ment have been deducted, plus an amount equivalent to a reasonable attorney's fee proportionate to any refund to the United States;

(c) There shall then be remitted to the Office, the benefits which have been paid on account of the injury, which shall include payments made on account of medical or hospital treatment, funeral expense, and any other payments made under the Act on account of the injury or death;

(d) Any surplus then remaining may be retained by the injured employee or his dependents, and the net amount of damages received by the beneficiary shall be credited against future payment of benefits to which the beneficiary may be entitled under the Act on account of the same injury or death.

The Pennsylvania No-Fault Motor Vehicle Insurance Act, Pa. Stat. Ann. tit. 40, §1009.206(a) (Purdon Cum. Supp. 1983) (footnotes omitted), provides:

> Except as provided in section 108(a)(3) of this act, all benefits or advantages (less reasonably incurred collection costs) that an individual receives or is entitled to receive from social security (except those benefits provided under Title XIX of the Social Security Act and except those medicare benefits to which a person's entitlement depends upon use of his so-called "life-time reserve" of benefit days) workmen's compensation, any State-required temporary, nonoccupational disability insurance, and all other benefits (except the proceeds of life insurance) received by or available to an individual because of the injury from any government, unless the law authorizing or providing for such benefits or advantages makes them excess or secondary to the benefits in accordance with this act, shall be subtracted from loss in calculating net loss.

The Pennsylvania No-Fault Motor Vehicle Insurance Act, Pa. Stat. Ann. tit. 40, §1009.301, (Purdon Cum. Supp. 1983) (footnote omitted), provides:

(a) **Partial abolition.**—Tort liability is abolished with respect to any injury that takes place in this State in accordance with the provisions of this act if such injury arises out of the maintenance or use of a motor vehicle, except that:

(1) An owner of a motor vehicle involved in an accident remains liable if, at the time of the accident, the vehicle was not a secured vehicle.

(2) A person in the business of designing, manufacturing, repairing, servicing, or otherwise maintaining motor vehicles remains liable for injury arising out of a defect in such motor vehicle which is caused or not corrected by an act or omission in the course of such business, other than a defect in a motor vehicle which is operated by such business.

(3) An individual remains liable for intentionally injuring himself or another individual.

(4) A person remains liable for loss which is not compensated because of any limitation in accordance with section 202(a), (b), (c) or (d) of this act. A person is not liable for loss which is not compensated because of limitations in accordance with subsection (e) of section 202 of this act.

(5) A person remains liable for damages for non-economic detriment if the accident results in:

(A) death or serious and permanent injury; or

(B) the reasonable value of reasonable and necessary medical and dental services, including prosthetic devices and necessary ambulance, hospital and professional nursing expenses incurred in the diagnosis, care and recovery of the victim, exclusive of diagnostic x-ray costs and rehabilitation costs in excess of one hundred dollars ($100) is in excess of seven hundred fifty dollars ($750). For purposes of this subclause, the reasonable value of hospital room and board shall be the amount determined by the Department of Health to be the average

daily rate charged for a semi-private hospital room and board computed from such charges by all hospitals in the Commonwealth; or

(C) medically determinable physical or mental impairment which prevents the victim from performing all or substantially all of the material acts and duties which constitute his usual and customary daily activities and which continues for more than sixty consecutive days; or

(D) injury which in whole or in part consists of cosmetic disfigurement which is permanent, irreparable and severe.

(6) A person remains liable for injury arising out of a motorcycle accident to the extent that such injury is not covered by basic loss benefits payable under this act, as described in section 103.

**(b) Nonreimbursable tort fine.**—Nothing in this section shall be construed to immunize an individual from liability to pay a fine on the basis of fault in any proceeding based upon any act or omission arising out of the maintenance or use of a motor vehicle: Provided, That such fine may not be paid or reimbursed by an insurer or other restoration obligor.

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No. 83-838

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER,

v.

PAUL B. LORENZETTI, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

# BRIEF IN OPPOSITION

Charles Sovel
Freedman and Lorry, P.C.
Attorneys for Respondent
800 Lafayette Building
5th and Chestnut Streets
Philadelphia, PA 19106
(215) 925-8400

## QUESTIONS PRESENTED

1. Is not the right of the United States to assert a subrogation lien for benefits paid to a federal employee under the Federal Employees' Compensation Act, 5 U.S.C. §8132, against an employee's third-party recovery subject to the provisions of the State substantive law governing that third-party recovery?

2. May the United States assert a subrogation lien for medical expenses and compensation benefits paid to a federal employee under the Federal Employees' Compensation Act, 5 U.S.C. §8132, against the employee's third-party tort recovery in an action subject to the Pennsylvania No-Fault Insurance Law, 40 P.S. §1009.101 et seq., where the Pennsylvania No-Fault Insurance Law bars the employee from recovering such items as

damages in his third-party tort action?

3. Is not the United States' right to assert a subrogation lien against an employee's third-party recovery in an action subject to the Pennsylvania No-Fault Insurance Law barred by that law's provision barring subrogation with respect to payments considered to be No-Fault benefits?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

# BRIEF IN OPPOSITION

## OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a-11a) is reported at 710 F.2d 982. The opinion of the district court (App. C, 13a-18a) is reported at 550 F. Supp. 997.

## JURISDICTION

The judgment of the court of appeals

(App.B, 12a) was entered on June 22, 1983. On September 13, 1983, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including November 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional,statutory and regulatory provisions are reproduced in App. E, 20a-25a).

## STATEMENT

Respondent accepts as correct the statement of facts as set forth in the Petition. Broadly stated, these facts present the following situation.

The Commonwealth of Pennsylvania has a No-Fault Insurance Law applicable to motor vehicle accidents. Under this law, a person injured in a motor vehicle

accident is entitled to receive, as No-Fault benefits, payment of his medical expenses and a portion of his wage loss, subject to certain limitations not here relevant. Payments received as workmen's compensation benefits (under any compensation act) are treated as being the equivalent of the receipt of No-Fault payments. In addition to the receipt of No-Fault benefits, a person injured in a motor vehicle accident also may bring a third-party action against a negligent third-party, provided certain threshhold requirements are met, but in such actions, no benefits received as No-Fault may be proved or recovered against the third-party. As a result, except in those instances where the injured party's wage loss may be greater than the amount received as a No-Fault benefit, the third-

party recovery is limited to an award of damages for pain and suffering.

The issue presented in this case is whether the United States, as the plaintiff's employer, and as the payor of his No-Fault benefits in the form of workmen's compensation benefits, may subrogate against the employee's third-party recovery of damages for pain and suffering for the amount of benefits paid as No-Fault benefits, given the fact that such No-Fault benefits were not provable or permitted items of damages in the third-party action.

REASONS FOR DENYING THE WRIT

1. As the Court below itself noted (App. A, p.4a), the decision below rejects the views of the Sixth Circuit as expressed in Ostrowski v. Roman Catholic Archdiocese, etc., 479 F.Supp. 200 (E.D. Mich. 1979), aff'd. 653 F.2d

239 (6th Cir. 1981), and to this extent, there now exists a conflict in Circuits. However, the reasoning of the Court below is, we submit, so clearly correct that further review by this Court is neither necessary nor warranted.

2. The concern expressed in the Petition that the decision below would create confusion because of the number of States which have No-Fault laws, many of which differ in varying degrees, is not warranted, nor does it present a reason for this Court granting certiorari. The third-party action permitted a federal employee under the Federal Employees' Compensation Act, 5 U.S.C. §8132 (App.E, p. 21a-22a), is neither defined nor governed by federal law; rather it is based on other substantive law which, in most instances would be State law rather

than federal law. Thus, the third-party action permitted the federal employee always is subject to the laws of the various states, laws which may differ both as to their substantive provisions defining the basis of recovery as well as the elements of damages which may be recovered. If there is confusion in defining a federal employee's right of a third-party recovery, this is a confusion which was intended by Congress when it chose to leave the determination of the right to recover to State law, or other substantive law where applicable.

The advent of No-Fault insurance laws in some States creates no more confusion in the administration of the Federal Employees' Compensation Act than would exist without such No-Fault laws. The falacy in the argument being advanced by

the United States is that it ignores the point that Congress, in permitting a federal employee the right to seek a third-party recovery, consciously chose to leave the substantive provisions governing the right to such a recovery to State law. This has been the consistent policy of Congress in matters of this nature and, it should be noted, that claims brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §2674, always have been subject to State substantive law, with its many variations, and are not based on any uniform, federally defined substantive law of recovery, cf., Heusle v. National Mutual Insurance Co., 628 F.2d 833 (3rd Cir. 1980). Carried to its logical conclusion, the argument here being advanced by the United States would preclude a State (1) from abolishing third-party recovery in particular

instances, (2) adopting statutes of limitations which might be more restrictive than the government would like, or (3) making any similar changes in its substantive tort law.

3. The right of the United States to be reimbursed for its compensation payments from an employee's third-party recovery clearly is one of subrogation, and is dependent upon a third-party recovery being made. The right of subrogation traditionally has been recognized as being an equitable concept, for otherwise the employee might make a double recovery, i.e., recovering his medical expenses and wage loss from his employer, and then recovering these amounts a second time from the third-party. Where there is no third-party recovery for medical expenses or wage

loss, then the employee is not making a "double recovery", and there is no basis for recognizing any right of subrogation. The effect of the argument being advanced by the United States in the instant case is to require that the employee reimburse the government from the proceeds of his third-party action recovery for pain and suffering for those monies which he received for medical expenses and wage loss, when such items were not and could not be recovered in the third-party action. Directing such reimbursement thus would result in denying the injured employee the benefit of a single recovery, clearly not the purpose of subrogation.

The language of the Federal Employees' Compensation Act cannot be blindly interpreted as intending to accomplish so incongruous a result. The subrogation provision of the Federal Employees'

Compensation Act, 5 U.S.C. §8132, originally was adopted in 1916 (and last amended in 1966), long before the No-Fault concept even was on the horizon, let alone a viable statutory enactment. In the context in which 5 U.S.C. §8132 was enacted, the third-party recovery against which a subrogation lien could be asserted universally permitted the proof and recovery of medical expenses and full wage loss. In this context, the effect of permitting subrogation for all payments made as medical expenses and wage benefits was reasonable as such losses were proveable in the injured employee's action for a third-party recovery, and permitting subrogation for all payments made as medical expenses and wage benefits operated only to preclude an injured employee from obtaining a double recovery by requiring the

repayment of compensation benefits from the damages recovered in the third-party litigation. There is no reason to believe that Congress intended any other result, nor is there any reason to believe that Congress ever desired to deprive the employee of the benefit of a single third-party recovery.

The decision below is eminently correct for the reasons stated in the Court below's Opinion and, we submit, further review by this Court is unwarranted.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Charles Sovel, Esq.
Freedman and Lorry, P.C.
800 Lafayette Building
5th and Chestnut Streets
Philadelphia, PA 19106
(215) 925-8400
Attorneys for Respondent

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,

No. 83-838

# In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

*v.*

PAUL B. LORENZETTI

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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## REPLY MEMORANDUM FOR THE UNITED STATES

1. Respondent concedes (Br. in Opp. 4-5), as he must, that there is a direct conflict between the Third Circuit's decision in this case and the Sixth Circuit's decision in *Ostrowski* v. *Dep't of Labor, OWCP*, 653 F.2d 229 (1981). In an effort to support the decision below, however, respondent obfuscates the issue in the case and departs from the court of appeals' own reasoning.

Respondent's emphasis on the state law basis of a federal employee's right to recover from a third-party tortfeasor (Br. in Opp. 5-8) simply misses the point of the question presented. That question is whether, once a federal employee has recovered damages in a tort action against a third party, he should be relieved of his obligation under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8132, to reimburse the federal government for compensation payments it made to him on the ground that (because of the effect of a state no-fault insurance scheme) the damages

he recovered do not include payments for medical expenses and lost wages. The FECA itself creates no cause of action in tort against persons who injure federal workers; nor is the existence of such a cause of action at issue in this case.

The FECA does impose an obligation on a federal employee to reimburse the government for payments he receives from the compensation fund in certain circumstances. When (i) an employee sustains an injury for which compensation is payable under the FECA, (ii) the injury is caused under circumstances creating a legal liability in a third party other than the United States to pay damages, and (iii) the employee in fact recovers damages, the employee must refund the amount of benefits paid on his behalf (after various statutory deductions). Respondent meets these conditions and therefore (under our reading of Section 8132) has incurred an obligation to reimburse the compensation fund under federal law, regardless of the operation of any state no-fault insurance scheme. The conflict created by this case concerns the proper interpretation of the federal statute, not any disputed question of state law.

2. Respondent errs in contending (Br. in Opp. 8-11) that Congress intended 5 U.S.C. 8132 to operate as an equitable subrogation provision. Section 8132 was designed in large part to minimize the cost of the compensation program by providing for replenishment of the fund (see Pet. 13-15); the duty of reimbursement it prescribes is not dependent on any subrogation principle. In any event, in amending Section 8132 in 1974,[1] Congress responded to equitable concerns about the operation of Section 8132 by permitting an employee to retain at least one-fifth of his tort recovery after the payment of costs and attorney's fees. See Pet. 17. In view

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[1]Respondent errs in representing (Br. in Opp. 10) that Section 8132 was last amended in 1966. Our petition (at 16-17) discusses the 1974 amendments to Section 8132.

of the 1974 amendment, there is no reason to invoke inapplicable principles such as subrogation in order to do equity.

3. We note that the decision in this case has already begun to have repercussions, even beyond the no-fault context. In *Green* v. *United States Dep't of Labor*, Civ. No. 3-82-1282 (D. Minn. Dec. 16, 1983), the court cited the court of appeals' decision in this case in support of its holding that the government could not obtain reimbursement under the FECA from an employee's third-party tort recovery because the employee had been barred from pleading or proving damages covered by FECA benefits in the tort action on the ground that he was not the real party in interest. The court in *Green* concluded that the facts there were "indistinguishable" from the facts of this case, since the employee in *Green* "was affirmatively prevented from asserting his claim for past lost wages and medical expenses" (although for a reason other than operation of a no-fault scheme) (slip op. 8-9).[2] Thus, in addition to the state-by-state litigation in no-fault jurisdictions that we anticipated in our petition (at 8-10), it appears that the government may be required as well to litigate the interpretation of the FECA in states without no-fault insurance schemes.

For the foregoing reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
*Solicitor General*

JANUARY 1984

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[2]Copies of the slip opinion in *Green* are being lodged with the Clerk of the Court and provided to respondent's counsel.


Brief for
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No. 83-838

# In the Supreme Court of the United States

OCTOBER TERM, 1983

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UNITED STATES OF AMERICA, PETITIONER

*v.*

PAUL B. LORENZETTI

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*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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REX E. LEE
*Solicitor General*
RICHARD K. WILLARD
*Acting Assistant Attorney General*
KENNETH S. GELLER
*Deputy Solicitor General*
CAROLYN F. CORWIN
*Assistant to the Solicitor General*
WILLIAM KANTER
FREDDI LIPSTEIN
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTION PRESENTED

Whether a federal employee who has received Federal Employees' Compensation Act benefits for injuries suffered in the course of his employment is obligated by 5 U.S.C. 8132 to reimburse the United States out of damages recovered from a negligent third party when a state no-fault automobile insurance statute allows such tort recovery for pain and suffering but not for medical expenses and lost wages.

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### JURISDICTION

The judgment of the court of appeals (Pet. App. 12a) was entered on June 22, 1983. On September 13, 1983, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including November 19, 1983. The petition for a writ of certiorari was filed on November 18, 1983, and was granted on January 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory and regulatory provisions are reproduced in App., *infra*, 1a-6a.

## STATEMENT

1. a. The Federal Employees' Compensation Act (FECA or the Act), 5 U.S.C. 8101 *et seq.*, establishes a comprehensive program of compensation benefits for government employees injured in work-related accidents. If an employee is injured "while in the performance of his duty" (5 U.S.C. 8102(a)), he is entitled to compensation for expenses of medical and related services (5 U.S.C. 8103, 8111) and of vocational rehabilitation (5 U.S.C. 8104) and for a percentage of his lost wages (5 U.S.C. 8105-8107, 8110). Benefits may be paid to an employee's survivors in the case of death (5 U.S.C. 8133, 8134). The FECA was designed to give injured federal employees a speedy and certain recovery for work-related injuries, regardless of fault or contributory negligence and without the need for litigation or expense. See *Lockheed Aircraft Corp.* v. *United States*, No. 81-1181 (Feb. 23, 1983), slip op. 4; *Johansen* v. *United States*, 343 U.S. 427, 439-441 (1952); *Dahn* v. *Davis*, 258 U.S. 421, 431 (1922).

The liability of the United States under the FECA is exclusive (5 U.S.C. 8116(c)); thus, an employee who sustains a compensable injury may not sue the United States in tort. However, if an employee sustains a compensable injury "creating a legal liability on a person other than the United States to pay damages," the Secretary of Labor may require the employee to assign his cause of action to the United States or to bring a third party action in his own name (5 U.S.C. 8131(a)). If the employee refuses to assign or prosecute his cause of action, he is not entitled to receive FECA compensation (5 U.S.C. 8131(b)).

The FECA provides that the government is entitled to receive reimbursement for benefits it has paid in connection with an injury out of any recovery from a third party tortfeasor. If the employee assigns his cause of action to the United States, the Secretary may prosecute or compromise the action, and any recovery must first satisfy the FECA compensation fund for the amount of benefits paid to the employee. This provision is qualified by the requirement that the employee receive at least one-fifth of the net amount of the settlement or recovery (after deduction of the Secretary's expenses of settlement or recovery). 5 U.S.C. 8131(c).

If the employee himself receives "money or other property" in satisfaction of the legal liability of a third party to pay damages, he may deduct the cost of recovery, including a reasonable attorney's fee, and may retain one-fifth of the net amount. Following these deductions, the employee must reimburse the FECA compensation fund for any benefits already paid to him and must credit the surplus to future compensation payments for the same injury. 5 U.S.C. 8132. The Act provides that "[n]o court, insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States" (*ibid.*). Pursuant to 5 U.S.C. 8149, the delegation of rulemaking authority, the Secretary of Labor has promulgated 20 C.F.R. 10.503, which sets out procedures for reimbursement of the FECA compensation fund from third party recoveries.

b. The Pennsylvania No-Fault Motor Vehicle Insurance Act (No-Fault Act), Pa. Stat. Ann. tit. 40, §§ 1009.101 *et seq.* (Purdon Cum. Supp. 1983), became effective in 1975. The primary purpose of the No-Fault Act is to provide, at reasonable cost, prompt and adequate basic loss benefits to victims of motor vehicle accidents and their survivors. See *id.* § 1009.102(b). To

accomplish this goal, the No-Fault Act provides for the payment of benefits covering basic economic losses on a first party basis, *i.e.*, an accident victim's own insurance company pays for basic losses (including an unlimited amount of medical expenses and lost wages up to $15,000), regardless of fault (*id.* §§ 1009.104, 1009.106, 1009.202). The No-Fault Act defines "basic loss benefits" that must be paid by the no-fault insurer as "net loss sustained by a victim, subject to any applicable limitations [or] exclusion * * *" (*id.* § 1009.103). In computing "net loss," a no-fault insurer may deduct any government benefits, including workers' compensation, that the victim receives or is entitled to receive because of his injury, "unless the law authorizing or providing for such benefits or advantages makes them excess or secondary to the benefits in accordance with this act * * *" (*id.* § 1009.206(a)). Accordingly, a no-fault insurer in Pennsylvania is not required to pay benefits for losses that also are covered by a program such as the FECA.

The No-Fault Act partially abolishes tort liability for injuries that take place in Pennsylvania if they arise out of the use and maintenance of a motor vehicle. A victim may not obtain a tort recovery for economic losses (*e.g.*, medical expenses and lost wages), except to the extent they are not compensated because they exceed statutory no-fault limits. Pa. Stat. Ann. tit. 40, § 1009.301(a)(4) (Purdon Cum. Supp. 1983). Thus, a tortfeasor is not liable for medical expenses or the first $15,000 in lost wages, since the No-Fault Act requires the no-fault insurer to pay all such expenses; however, a tortfeasor would be liable for any lost wages over and above the $15,000 statutory ceiling on no-fault coverage for that category of loss. A tortfeasor remains liable for damages for noneconomic losses (*e.g.*, pain and suffering) if an accident results in death or serious and permanent injury, if the reasonable value of necessary medical and dental services exceeds $750, or if the vic-

tim is disabled for more than 60 days or suffers serious and permanent disfigurement (*id.* § 1009.301(a)(5)).

2. Respondent is a special agent for the Federal Bureau of Investigation. He was injured in Pennsylvania in November 1977 when the automobile he was driving was struck by another vehicle. At the time of the accident, respondent was performing duties in the scope of his employment. Accordingly, he received FECA benefits covering his medical expenses and a percentage of his lost wages. Pet. App. 2a.

In 1979, respondent filed a tort action in the Court of Common Pleas of Philadelphia County against the driver of the vehicle that struck his automobile. Based on the FECA benefits it had paid, the federal government asserted a lien against any recovery by respondent. The driver of the other vehicle moved to exclude proof of medical expenses and lost wages, on the ground that, under the terms of the No-Fault Act, damages for such losses may not be recovered from a tortfeasor. The Court of Common Pleas agreed that respondent should not be permitted to prove such amounts, including the sum paid to respondent by the United States in the form of FECA benefits. Respondent ultimately settled the tort action for $8,500. The settlement figure represented compensation only for noneconomic losses, *i.e*, pain and suffering. Pet. App. 6a, 14a.

Pursuant to 5 U.S.C. 8132, the United States asserted its right to be reimbursed from respondent's settlement in the amount of $1,600.24, representing FECA benefits he had received.[1] Respondent then filed

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[1] The total amount of FECA benefits paid to respondent was $1,970.81. That amount includes compensation for both medical expenses and lost wages. In computing the amount of reimbursement owed by respondent, the government deducted $350.57, representing the government's share of the reasonable attorney's fee. The balance (actually $1,620.24, but shown as $1,600.24 on Department of Labor documents, apparently due

this declaratory judgment action in the United States District Court for the Eastern District of Pennsylvania to prevent the government from recovering the amount of the FECA benefits. Respondent contended that because the No-Fault Act precluded him from recovering damages for medical expenses and lost wages from the tortfeasor, the government should be barred from obtaining reimbursement from him to cover the benefits it had paid to compensate him for such losses.

3. The district court granted summary judgment for the United States (Pet. App. 13a-18a). The court held that the government was entitled to seek reimbursement from respondent's third party tort recovery, even though that recovery represented compensation only for his noneconomic losses, not for his medical expenses and lost wages. In concluding that all third party recoveries give rise to a duty to reimburse the government, the district court relied in large part on the decision in *Ostrowski* v. *Dep't of Labor, OWCP*, 653 F.2d 229 (6th Cir. 1981), which addressed the identical issue in a case involving the Michigan no-fault statute. The Sixth Circuit held in *Ostrowski* that the FECA unambiguously subjects all damages recovered from third parties to the obligation to reimburse the FECA compensation fund.

4. The court of appeals reversed (Pet. App. 1a-11a), expressly rejecting the Sixth Circuit's decision in *Ostrowski* (Pet. App. 5a). The court of appeals recognized that one of the primary purposes of the FECA reimbursement provision is to reduce the costs of the

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to a computational error) represents the amount respondent was asked to reimburse.

The district court stated (Pet. App. 13a n.1) that the government claimed only $1,044.38, following deduction of an attorney's fee from total benefits of $1,600.24, pursuant to 5 U.S.C. 8132. In fact, the figure of $1,600.24 already reflects the deduction of an attorney's fee, as the preceding paragraph indicates.

compensation program *(ibid.)*. It concluded, however, that requiring reimbursement in cases in which a federal employee could not recover tort damages for medical expenses and lost wages would be "manifestly unfair" to those employees who are subject to state no-fault statutes (*id.* at 7a).

The court of appeals remarked that reimbursement of the federal government in such circumstances would not serve to prevent double recovery or to foster ease of administration and would be inconsistent with Congress's perceived intent to make the government a "model employer" (Pet. App. 8a). In the latter regard, the court of appeals cited *Brunelli* v. *Farelly Bros.*, 266 Pa. Super. 23, 28, 402 A.2d 1058, 1061 (1979), which held that under Pennsylvania law workers' compensation carriers cannot be subrogees for money paid in a tort action confined to noneconomic loss under the state no-fault law. The court suggested that the FECA could be read in a similar manner in order to "put federal employees on an equal footing with their counterparts in private industry and * * * allow for a fair result under the terms of the statute" (Pet. App. 9a).

## SUMMARY OF ARGUMENT

A. 1. The plain language of 5 U.S.C. 8132 provides that a FECA beneficiary who has received "money or other property" in satisfaction of a third party's liability for an injury must use that recovery to reimburse the compensation fund for the amount of FECA benefits he has received in connection with that injury. There is no suggestion in the statute that reimbursement is to be made only from the portions of a third party recovery that represent damages for medical expenses and lost wages. Other parts of the FECA, including the provision that the Secretary of Labor may require employees to assign their third party claims to the United States, reinforce the conclusion that Section 8132

should be construed in accordance with its plain meaning.

The Secretary has long interpreted the FECA as requiring reimbursement of the compensation fund from any part of an employee's third party recovery. That construction of the statute by the official charged with its administration is entitled to deference.

Reimbursement provisions of other compensation statutes have been construed as requiring reimbursement from any portion of a beneficiary's third party recovery, including amounts representing damages for pain and suffering. In particular, courts have concluded that the reimbursement provisions of the Railroad Unemployment Insurance Act and the New York workers' compensation statute require reimbursement from third party recoveries, even when a state no-fault statute limits such recoveries to noneconomic losses.

2. The legislative history of the FECA does not suggest that Congress intended employees to reimburse the compensation fund only from damages for medical expenses and lost wages. Although Congress must have been aware that there would be cases in which reimbursement necessarily would come out of an employee's damages for noneconomic losses, it made no attempt to shield such damages from the obligation to reimburse. In recent amendments to the FECA, Congress has not curtailed the reimbursement obligation in response to state no-fault statutes, but rather has strengthened it.

B. The requirement that a FECA beneficiary reimburse the United States from his third party recovery, whether or not it includes damages for medical expenses and lost wages, is consistent with the congressional purposes underlying Section 8132. The primary purpose of that provision is to minimize the costs of the FECA program. Requiring reimbursement from any third party recovery clearly increases the amounts available for defraying those costs.

Requiring reimbursement from any third party recovery also furthers administrative efficiency by allowing the Secretary to apply uniform reimbursement procedures throughout the country. The court of appeals' contrary interpretation of the statute would impose a significant administrative burden on the Secretary, who would be required to adjust the federal scheme on a state-by-state basis to accommodate the numerous variations in no-fault schemes.

The court of appeals was impressed by the fact that reimbursement is not necessary to prevent double recoveries by employees in cases in which a state no-fault statute limits tort liability. But the court itself recognized that reimbursement may be required in some situations in which there is no possibility of double recovery.

C. The court of appeals' reasons for departing from the plain language of the statute cannot withstand scrutiny. The court's "reinterpretation" of the FECA to take account of a recently enacted state no-fault insurance scheme disregards this Court's admonition that comprehensive federal statutory compensation schemes are "not to be judicially expanded because of 'recent trends.'" *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, No. 81-1891 (May 24, 1983), slip op. 11 (quoting *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 279 (1980)).

The court of appeals' citation of the Senate committee's statement that the 1974 FECA amendments would help the federal government to be a "model employer" is insufficient support for the court's attempted rewriting of Section 8132. Moreover, the court's suggestion that there is "unfairness" in the FECA scheme that would justify such judicial rewriting is incorrect, particularly in light of Congress's provision that employees may keep one-fifth of any third party tort recovery.

The court of appeals clearly erred in concluding that the reimbursement provision must be read out of the federal statute in order to accommodate the operation of the state no-fault scheme. While states may change the relationships among parties subject to state control, they may not alter the rights of the federal government under a federal statute. Only Congress can alter the FECA reimbursement provision, and there is no indication that it has chosen to do so. Thus, the FECA requires respondent to reimburse the United States from his third party recovery in this case.

## ARGUMENT

### A FEDERAL EMPLOYEE WHO HAS RECEIVED FEDERAL EMPLOYEES' COMPENSATION ACT BENEFITS FOR INJURIES SUFFERED IN THE COURSE OF HIS EMPLOYMENT MUST REIMBURSE THE UNITED STATES OUT OF DAMAGES RECOVERED FROM A NEGLIGENT THIRD PARTY IN CASES IN WHICH A STATE NO-FAULT AUTOMOBILE INSURANCE STATUTE PERMITS TORT RECOVERY ONLY FOR LOSSES OTHER THAN MEDICAL EXPENSES AND LOST WAGES

The Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*, establishes a comprehensive workers' compensation scheme under which federal employees or their survivors receive benefits, regardless of considerations of fault, for employment-connected injuries or death. Almost three million persons are covered by the Act, and FECA payments by the federal government are in the range of $1 billion per year.[2]

Under the Act, employees who are eligible to receive FECA benefits may not pursue a tort action against the

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[2] See *Report of the Comptroller General: Labor Department Is Strengthening Procedures to Recover Costs for Federal Employees' Injuries Caused by Third Parties*, 1 (May 9, 1979); U.S. Office of Management and Budget, *Appendix to Budget of the United States Government, Fiscal Year 1985*, at I-013.

government in connection with such injuries. However, the Act does not preclude a third party tort action in cases in which an entity other than the federal government contributed to a work-related injury. Since its enactment in 1916, the FECA has provided that the Secretary of Labor may require that the injured employee assign to the United States his right of action against a third party; alternatively, the Secretary may require the employee to prosecute the action in his own name. Under the first alternative, the Secretary retains the amount of compensation paid on account of the injury and returns the excess to the employee. Under the second alternative, the employee must reimburse the United States from his third party recovery in the amount of FECA compensation paid to him. See 5 U.S.C. 8116(c), 8131, 8132.

The issue in this case arises as the result of the simultaneous operation of this longstanding FECA scheme and the Pennsylvania no-fault automobile insurance statute, which became effective in 1975. Under the Pennsylvania statute, an individual's own insurer is responsible for paying benefits for basic economic losses (*i.e.*, medical expenses and lost wages up to a ceiling amount) resulting from an automobile accident. An individual whose injury is serious may bring a tort action against another driver, but may not collect damages for expenses defined as basic economic losses under the no-fault statute. A no-fault insurer need not pay benefits to the extent workers' compensation is available to an individual; but even when the individual receives workers' compensation rather than no-fault benefits, he may not obtain a tort recovery for any amounts defined as basic economic losses.

The federal and state statutes combine to create the situation faced by respondent in this case: a federal employee who is involved in a work-related automobile accident receives FECA benefits to cover his medical ex-

penses and lost wages; when he sues a third party tortfeasor, state law prevents him from recovering damages for medical expenses and lost wages to the extent they are below the ceiling set by the no-fault statute, so that his recovery includes only damages for noneconomic losses (*e.g.*, pain and suffering); the employee nevertheless is required by the federal statute to use his third party recovery to reimburse the United States for any FECA compensation payments he has received.

The court of appeals viewed this result as "manifestly unfair" to federal employees, who must use the damages they recover for noneconomic losses to reimburse the federal government for amounts it has expended to compensate for economic losses. However, the court did not recommend that the Pennsylvania legislature revise the no-fault statute to correct the situation. Nor did it search for an interpretation of the Pennsylvania statute that might alleviate any hardship to federal employees. Finally, the court did not recommend that Congress amend the FECA to take account of the operation of the Pennsylvania no-fault statute. Instead, the court proceeded in effect to read the reimbursement provision out of the federal statute in cases in which a state no-fault statute limits an employee's third party tort recovery.

We submit that the plain language of the FECA requires reimbursement of the United States from respondent's third party recovery. Consideration of the legislative history, legislative purposes, and relevant principles of statutory construction support that conclusion. The court of appeals' interpretation of the reimbursement provision is contrary to principles this Court has followed in construing provisions of federal statutory compensation schemes and should be rejected.

### A. The Plain Language and Legislative History of 5 U.S.C. 8132 Indicate That a Federal Employee Who Receives FECA Benefits for Injuries Suffered in the Course of His Employment Must Reimburse the United States Out of Any Damages Recovered From a Negligent Third Party

1. a. The starting point in construing a statute is the language of the statute itself. *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The reimbursement provision of the FECA, 5 U.S.C. 8132, states in pertinent part:

> If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary * * * receives money or other property in satisfaction of that liability * * * the beneficiary * * * shall refund to the United States the amount of compensation paid * * *.

Section 8132 unequivocally provides that when a FECA beneficiary has suffered an injury for which a third party is legally liable to pay damages, and the beneficiary recovers "money or other property" in satisfaction of that liability, the beneficiary must (after making certain deductions described in the statute) apply that recovery to reimburse the United States for the amount of FECA benefits received. There is no indication of any kind in Section 8132 that the employee's duty to reimburse the compensation fund depends on any provision of state law or on whether the third party recovery includes damages for medical expenses and lost wages.[3] As the Sixth Circuit noted in *Ostrowski* v.

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[3] In his Brief in Opposition (at 5-11), respondent characterized the government's right to reimbursement under Section 8132 as essentially a right of subrogation that depends on the employee's rights under state law and that can be destroyed if the state abolishes tort liability for medical expenses and lost wages. Those contentions are incorrect. Section 8132 on its face

*Dep't of Labor, OWCP*, 653 F.2d 229, 230 (1981) (quoting 479 F. Supp. at 203), "[t]here is no language in Section 8132 delineating two classes of damages—one of which gives rise to a duty to reimburse and one of which does not. On the contrary, by its terms the duty to reimburse encompasses all damages recovered from third parties." See also *United States* v. *Hayes*, 254 F. Supp. 849, 851 (W.D. Ky. 1966) (noting that the reimbursement provision, then 5 U.S.C. (1964 ed.) 777, "is clear and unambiguous, and makes no provision for the segregation or division of damages"). Here respondent recovered "money or other property" in satisfaction of a "liability" of a third party that resulted from a work-related injury. Thus, under the terms of the statute, he must "refund to the United States the amount of [FECA] compensation paid."[4]

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is not based on any right of subrogation; rather, it creates an independent right of reimbursement from whatever amount an employee has been able to recover from a third party on account of the circumstances leading to the payment of FECA benefits. Section 8131, the provision for assignment of an employee's claim to the United States, could be characterized as a subrogation provision. But in any event, neither section limits the government's rights to damages attributable to medical expenses and lost wages.

[4] The wording of Section 27 of the Act of Sept. 7, 1916, ch. 458, 39 Stat. 747-748, the original reimbursement provision, reinforces the conclusion that reimbursement must be made from all damages awards. Section 27 provided that an employee who receives "*any* money or other property in satisfaction of the liability" of a third party for his injury shall "apply the money or other property" as a refund to the United States (emphasis added). The word "any" was dropped in 1966 when Title 5 was recodified. See Pub. L. No. 89-554, § 1, 80 Stat. 547. However, the 1966 recodification was not designed to make any substantive change in the law. Pub. L. No. 89-554, § 7(a), 80 Stat. 631.

The court of appeals concluded that it was necessary to go beyond the language of the statute, citing *Rose* v. *Lundy*, 455 U.S. 509, 517 (1982), for the proposition that if Congress could not have anticipated the concept of no-fault insurance at the

Other provisions of the FECA support the conclusion that the language of Section 8132 should be read in accordance with its plain meaning. Under 5 U.S.C. 8131 the Secretary may require an employee to assign to the United States his right of action against a third party. The Secretary may then prosecute or compromise the action and, when he realizes on the cause of action, "he shall deduct therefrom and place to the credit of the Employees' Compensation Fund the amount of compensation already paid to the beneficiary and the expense of realization or collection." 5 U.S.C. 8131(c). Under Section 8131, the Secretary could require assignment in any case in which an employee's third party recovery would be affected by a no-fault scheme, could prosecute and recover on the employee's "cause of action," and could then retain any portion of the recovery necessary to cover the FECA benefits paid to the employee.

On its face, Section 8131 allows the Secretary to exercise complete control over the conduct of any third party action as an alternative to prosecution of the action by the employee and reimbursement under Section 8132. Moreover, it is the employee's "cause of action" that is assigned to the United States under Section 8131, not merely his right to recover certain elements of damages. Thus, it seems clear that the Secretary himself could sue on the employee's "cause of action" for negligence and could recover (and retain) any sort of damages the employee himself could receive under that cause of action, including damages for pain and suffer-

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time it drafted the statute, it was necessary to analyze the statutory purposes in order to determine the proper scope of the statute. Pet. App. 6a-7a. But in *Rose* v. *Lundy* the Court found the statutory language to be ambiguous, while here the statute is clear on its face. In any event, as we show in Part B of this brief, a literal reading of Section 8132 is consistent with the congressional purposes underlying its enactment.

ing. There is no reason not to read Section 8132 generously to correspond to the broad scope of the companion section.

The exclusive liability provision of the FECA, 5 U.S.C. 8116(c), also lends support to a reading of Section 8132 that is consistent with its broad language. The fact that a federal employee's exclusive remedy against the government for work-related injuries is under the FECA in effect means that FECA benefits constitute compensation for any liability the United States might otherwise have, not just liability for economic losses. Indeed, if there had been no third party tortfeasor in this case, respondent would have received only FECA compensation and would have had no opportunity to recover additional damages for, *e.g.*, pain and suffering. See *Lockheed Aircraft Corp.* v. *United States*, No. 81-1181 (Feb. 23, 1983), slip op. 3-4. Therefore, it can hardly be viewed as unreasonable to require that an employee apply all classes of damages to reimburse the government for benefits it has paid in cases in which there happens to be a third party tortfeasor.

b. The Secretary of Labor has long construed 5 U.S.C. 8132 to require reimbursement from any third party recovery, regardless of the elements of damages that make up the recovery. That construction by the official responsible for administration of the FECA is entitled to deference. See *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, No. 81-1891 (May 24, 1983), slip op. 10; *Miller* v. *Youakim*, 440 U.S. 125, 144 & n.25 (1979); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

Under 5 U.S.C. 8149, Congress has delegated to the Secretary the authority to "prescribe rules and regulations necessary for the administration and enforcement" of the FECA. In the exercise of that authority, the Secretary has promulgated 20 C.F.R. 10.503, which provides (emphasis added) that if, in an action against a third party tortfeasor, "the beneficiary shall recover

damages or receive *any* money or other property in satisfaction of the liability of such other person on account of [a work-related] injury or death, the proceeds of such recovery shall be applied" as reimbursement for FECA benefits paid.[5]

The Secretary has consistently taken the position that Section 8132 requires an employee to reimburse the government from any damages award, even if the award represents only damages for pain and suffering. Compare *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, slip op. 10. The Secretary has taken this position in the context of a no-fault scheme (*Ostrowski* v. *Dep't of Labor, OWCP, supra*) and in a case involving an employee's claim that a settlement he obtained represented only compensation for pain and suffering (*United States* v. *Hayes, supra*). In both instances the courts upheld the Secretary's interpretation of Section 8132 and rejected the employees' attempts to avoid the statutory duty to reimburse the United States.[6]

c. The Secretary's construction of Section 8132 is reinforced by the fact that courts have construed similar provisions under other statutory compensation schemes to require reimbursement from any element of damages included in a third party tort recovery. For example, the Railroad Unemployment Insurance Act grants the

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[5] The reference in the regulation to "any money or other property" appears to date from at least 1938. See 20 C.F.R. 3.4 (1965) and source note for 20 C.F.R. Pt. 3 (1965).

[6] In *Ostrowski* the Michigan no-fault statute barred the plaintiff from recovering for his economic losses in a third party action. Plaintiff sought a declaratory judgment construing Section 8132 as requiring reimbursement only to the extent the third party recovery was attributable to the types of economic benefits conferred under the FECA (*e.g.*, medical expenses and lost wages). In *Hayes* the defendant refused to reimburse the FECA compensation fund, alleging that his settlement with a third party tortfeasor represented only damages for pain and suffering.

Railroad Retirement Board a right to reimbursement from any third party recovery by a beneficiary under that Act. 45 U.S.C. 362(*o*).[7] In *United States* v. *Rogers*, 658 F.2d 296 (1981), the former Fifth Circuit construed that provision as requiring full reimbursement despite the limitations on tort liability for automobile accidents imposed by the Georgia no-fault statute. The court of appeals rejected the contention of the beneficiary in that case that the Board could not obtain reimbursement of $3,250 in benefits it had paid to her because under the Georgia no-fault statute she was precluded from recovering the first $5,000 of her economic loss. The court held that "[u]nder the clear language of the federal statute, whether or not Georgia law restricts Rogers' recovery to certain types of damages is irrelevant to the Board's right of reimbursement." 658 F.2d at 297. The court went on to state that "[t]he Board's right of reimbursement under the Act cannot be restricted by state law" *(ibid.)*.

Similarly, the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. V) 901 *et seq.*, requires that beneficiaries use any third party recovery to reimburse the employer in an amount equivalent to compensation paid under that Act. Although that requirement apparently has not been interpreted in conjunction with a state no-fault statute, courts have concluded in related circumstances that the employer may obtain reimbursement from all parts of an employee's third party recovery, including damages

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[7] 45 U.S.C. 362(*o*) provides in pertinent part:

> The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee [with respect to days of sickness] * * * through suit, compromise, settlement, judgment, or otherwise on account of any liability * * * based upon such infirmity, to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity.

for pain and suffering. In *Haynes* v. *Rederi A/S Aladdin*, 362 F.2d 345 (5th Cir. 1966), cert. denied, 385 U.S. 1020 (1967), an injured longshoreman, whose third party tort recovery was reduced by 50% on account of his contributory negligence, contended that he should not be required to reimburse a compensation carrier from the portion of his damages that represented compensation for pain and suffering because such loss was not specifically compensable under the LHWCA. The Fifth Circuit rejected that contention, noting that LHWCA payments are made in lieu of all damages to which a beneficiary otherwise would be entitled, not just medical expenses or lost wages. The court held that Section 33 of the LHWCA, 33 U.S.C. 933, "makes it clear that the compensation insurer shall recover *in full* its payments from the *total* recovery obtained by the injured workman from a third party defendant, regardless of what that recovery replaces or is termed by the court." 362 F.2d at 350 (emphasis in original). Accord, *Ballwanz* v. *Jarka Corp.*, 382 F.2d 433, 436-437 (4th Cir. 1967); *Chouest* v. *A&P Boat Rentals, Inc.*, 321 F. Supp. 1290, 1292-1293 (E.D. La. 1971), rev'd on other grounds, 472 F.2d 1026 (5th Cir.), cert. denied, 412 U.S. 949 (1973).[8]

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[8] In *Heusle* v. *National Mutual Insurance Co.*, 628 F.2d 833 (1980), the Third Circuit construed the Medical Care Recovery Act, 42 U.S.C. 2651(a), as not requiring reimbursement to the government for medical expenses that were excluded from an employee's third party recovery by operation of the Pennsylvania no-fault statute. However, the wording of Section 2651(a) differs from that of the FECA reimbursement provision. Section 2651(a) refers to reimbursement from a third party tort recovery of "damages therefor," a term the court in *Heusle* thought referred back to expenses for medical care, mentioned earlier in Section 2651(a). 628 F.2d at 837. We believe the court in *Heusle* misconstrued Section 2651(a), but that in any event *Heusle* is distinguishable from this case because of the difference in wording of the FECA provision.

State courts generally have given a similar construction to reimbursement provisions in state workers' compensation statutes. The majority rule in the states is that an employee must reimburse his employer from any portion of his third party recovery, including damages solely for pain and suffering.

> [I]t is quite clear, as the cases now stand, that the prevailing rule in the United States refuses to place an employee's third-party recovery outside the reach of the employer's lien on the ground that some or all of it was accounted for by damages for pain and suffering. Indeed, this result has been reached even when the employee had taken the trouble to put his pain and suffering claim into a separate suit.

2A A. Larson, *The Law of Workmen's Compensation* § 74.35, at 14-476 to 14-478 (1983) (footnotes omitted). See, *e.g.*, *Hendry* v. *Industrial Comm'n*, 112 Ariz. 108, 538 P.2d 382 (1975), cert. denied, 424 U.S. 923 (1976) (carrier's lien extends to employee's entire third party recovery, including pain and suffering; plain language of the statute, which refers to "total recovery" and amount "actually collectible" controls, even if it might sometimes produce inequitable results); *Barth* v. *Liberty Mut. Ins. Co.*, 212 Ark. 942, 946, 208 S.W. 2d 455, 457 (1948) (employer's lien could not be frustrated by assertion of a claim only for pain and suffering); *Heaton* v. *Kerlan*, 27 Cal. 2d 716, 723, 166 P.2d 857, 861 (1946) (noting that segregation of damages for pain and suffering is unnecessary, since employer's lien attaches to "entire amount" of a judgment "for any damages" under the statute); *Tarr* v. *Republic Corp.*, 116 N.H. 99, 103, 352 A.2d 708, 712 (1976) (that part of third party recovery based on pain and suffering and other elements of damages besides the loss of earning capacity are not to be deducted from the recovery on which the carrier's lien is to take effect; damages were

limited because of statutory limit on recovery for wrongful death).[9]

Only a few courts have considered a state workers' compensation reimbursement provision in a situation in which tort damages are limited by a no-fault scheme. In *Granger* v. *Urda*, 44 N.Y. 2d 91, 375 N.E. 2d 380, 404 N.Y.S.2d 319 (1978), the New York Court of Appeals construed the pre-1978 version of the New York workers' compensation statute to require reimbursement from an employee's third party recovery, despite the fact that that recovery did not include amounts for

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[9] See also *Stewart* v. *Hanover Ins. Co.*, 416 So. 2d 286, 289 (La. Ct. App.), review denied, 421 So.2d 907 (La. 1982) (compensation benefits recoverable by employer out of claimant's third party damages for pain and suffering, lost wages or general damages); *In re Travaglione's Estate*, 36 Misc. 2d 645, 232 N.Y.S. 2d 961 (1962) (carrier's lien for compensation and medical expenses paid first from proceeds of third party settlement for conscious pain and suffering of decedent); *Bumbarger* v. *Bumbarger*, 190 Pa. Super. 571, 576, 155 A.2d 216, 219 (1959) (in action against third party tortfeasor, insurance carrier's right of subrogation includes any amount recovered by injured party for pain and suffering); *Ellis* v. *Kenworth Motor Truck Co.*, 466 F. Supp. 441 (N.D. Tex. 1979) (under Texas law subrogation lien of worker's compensation carrier extends to entire amount of settlement after deduction of attorney's fee). But see *Rascop* v. *Nationwide Carriers*, 281 N.W. 2d 170, 173 (Minn. 1979) (subrogation does not extend to so much of a settlement as was earmarked for wife's loss of consortium); *Naig* v. *Bloomington Sanitation*, 258 N.W. 2d 891, 894 (Minn. 1977) (distinguishing between recoverable and nonrecoverable portions of settlement for purposes of workers' compensation); *Fontenot* v. *Hanover Insurance Co.*, 385 So.2d 238, 240 (La. 1980) (compensation carrier may not obtain reimbursement for medical expense payments from employee's award for pain and suffering, but may obtain judgment directly against the third person for any medical expenses not included in the employee's award); *LaGraize* v. *Bickham*, 391 So.2d 1185, 1192 (La. Ct. App. 1980) (award for pain and suffering was not subject to insurance carrier's lien for wages and medical benefits paid).

wage loss and medical expense because the New York no-fault statute requires deduction of "basic economic losses" from tort recoveries.[10] The court noted that in

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[10] The Michigan Supreme Court reached a different result in *Great American Insurance Co.* v. *Queen*, 410 Mich. 73, 300 N.W.2d 895 (1980). There the court held that a workers' compensation carrier had no right to reimbursement for medical expenses when damages covering those expenses would not be recoverable by the beneficiary in a third party tort action under the terms of the Michigan no-fault statute. The court did not rest its decision on the language of the Michigan workers' compensation statute, but on its conclusion that the state legislature intended the worker's compensation carrier to substitute for the no-fault insurer to the extent workers' compensation benefits take the place of no-fault benefits. 300 N.W.2d at 901. The court was persuaded that if the legislature had considered the application of the workers' compensation statute and the no-fault statute to the case of a motor vehicle accident occurring in the course of employment, it "would have explicitly provided" that the compensation carrier's reimbursement rights are coextensive with those of the no-fault insurer, *i.e.*, that they are limited to cases in which there is tort recovery for basic economic loss. *Id.* at 897. In cases other than those involving the no-fault statute, Michigan adheres to the general rule that an employee must reimburse his employer from any portion of his third party recovery, including damages for pain and suffering. See *Pelkey* v. *Elsea Realty & Investment Co.*, 394 Mich. 485, 232 N.W.2d 154 (1975).

In *Brunelli* v. *Farelly Bros.*, 266 Pa. Super. 23, 402 A.2d 1058 (1979), cited by the court of appeals in this case (Pet. App. 9a), the state court held that the workers' compensation insurer had no subrogation right to any recovery the injured employee was able to obtain from the tortfeasor since the Pennsylvania no-fault statute had abolished tort liability except for amounts in excess of "basic loss benefits." In *Brunelli*, the court considered only an attempt by the compensation carrier to intervene in the employee's third party action in order to assert subrogation rights to the extent of the compensation paid and payable. In denying intervention, the court noted that under the subrogation provision of the workers' compensation statute, the carrier's cause of action depended on that of the employee-victim. The provision at issue in *Brunelli*, unlike the FECA, refers to

enacting the no-fault law the legislature had chosen not to alter the "absolute" nature of the compensation carrier's lien, which attached to the "proceeds of any recovery" in favor of a compensation claimant against a third party. While the court recognized that application of both the absolute lien of the compensation carrier and the limit on tort recovery imposed by the no-fault statute could lead to a "harsh, unintended result," it declined to depart from a literal reading of the reimbursement provision. 44 N.Y. 2d at 99.[11] The reasoning of the New York court applies with equal force to the reimbursement provision of the FECA.

2. There is no indication in the legislative history of the FECA that Congress intended a departure from the plain language of the statute, so that employees would reimburse the compensation fund only from damages for medical expenses and lost wages. The predecessor to 5 U.S.C. 8132 was enacted in 1916, long before the advent of state no-fault statutes. See Act of Sept. 7, 1916, ch. 458, § 27, 39 Stat. 747-748. Even then, however, Congress recognized that third party recoveries might include noneconomic components, such as punitive damages and "damages brought about by reason of mental pain and suffering." 53 Cong. Rec. 10910 (1916) (remarks of Rep. Barkley). Congress also must have been aware that full reimbursement of FECA payments occasionally would require recovery

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subrogation, not to an independent right of reimbursement of the carrier from the employee's recovery. See Pa. Stat. Ann. tit. 77, § 671 (Purdon Cum. Supp. 1983).

[11] In 1978, following the decision in *Granger* v. *Urda*, the New York legislature amended the workers' compensation statute to provide that a compensation carrier shall not have a lien on the proceeds of the recovery in an action arising out of an automobile accident. See *Vinson* v. *Berkowitz*, 83 A.D.2d 531, 441 N.Y.S.2d 460, 462 (1981) (quoting News Memorandum of State Executive Department, McKinney's 1978 Session Laws of New York, at 1748).

from those noneconomic elements. For example, benefits paid under FECA could exceed the portion of a third party recovery representing economic damages because an employee was unsuccessful in persuading a jury of the full measure of his economic losses. Alternatively, an employee's recovery might be reduced as a result of application of the doctrine of comparative negligence,[12] or because he settled a third party action for less than the full amount of his claim. Congress nonetheless made no attempt to shield the noneconomic elements of damages from the obligation to reimburse.

The only concern Congress expressed in connection with the draft reimbursement provision was that it might be read to allow the government to credit an employee's third party recovery for one injury against compensation payments due for some *future* injury.[13] In response to that concern, Congress included lan-

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[12] By 1916, several states had enacted general comparative negligence statutes. See W. Prosser, *Law of Torts* 436 (4th ed. 1971).

[13] Representative Barkley explained this concern (53 Cong. Rec. 10910 (1916)):

> It ought to be assumed that all over and above the compensation that the Government may pay [an employee] for a particular injury, if he recovered it from a private corporation, ought to be his when other things are taken into consideration in the recovery of a verdict besides mere loss of time. There may be something the man is entitled to recover besides loss of time if he is compelled to go through life disfigured, with one ear gone or one eye out or one toe cut off, where he may not have been permanently disabled, but might be able to go back into the service of the Government and still perform his duties; and he ought not to have that sort of sword of Damocles always hanging over him for fear that if he became injured again under independent circumstances he might not be entitled to compensation on account of the subsequent injury, because a part of the former recovery is credited upon any future compensation to which he might be entitled.

See also *id.* at 10911.

guage stating that any surplus recovery by the employee should be credited against future amounts payable "on account of the same injury." 39 Stat. 747-748. But Congress did not include a provision immunizing any part of a recovery for an injury from the obligation to reimburse the government for compensation payments made in connection with that same injury. Indeed, it seems unlikely that Congress would have chosen to take this additional step in view of the concern expressed by legislators about the potential cost of the FECA program at the time the legislation was under consideration. See, *e.g.* H.R. Rep. 678, 64th Cong., 1st Sess. 13-14 (1916); 53 Cong. Rec. 10907, 10910-10911 (1916).

Nor is there any indication in subsequent amendments to the FECA that Congress intended the government's right to reimbursement to extend only to certain parts of an employee's third party recovery. Despite the growth of comparative negligence and no-fault statutes, Congress has retained the broad language of the original reimbursement provision. Indeed, Congress has amended the FECA in ways designed to encourage employees to bring third party actions and otherwise to protect the government's interest in reimbursement from third party recoveries. In 1966, Congress added a provision that guaranteed that an employee could retain at least one-fifth of the net amount of any third party recovery after deductions for a reasonable attorney's fee and other costs of recovery. Pub. L. No. 89-488, § 10, 80 Stat. 255.[14] That provision was expressly intended to provide an incentive for employees to bring third party actions in cases in which dam-

[14] The Petition and Reply Memorandum at the petition stage indicated that the one-fifth provision was enacted as part of the 1974 FECA amendments. In fact, the provision was first enacted as part of the 1966 amendments and was revised in minor respects in 1974.

ages recovered might be less than the amount of FECA compensation received, so that the employee himself otherwise would obtain nothing from the suit. Representative O'Hara explained.

> If an employee can be awarded a substantial amount of damages, he will then have something to show for his pains. But if the damages are less than the entire amount of compensation for which he might be eligible throughout the course of his disability, then he has been put to the trouble of bringing suit to no advantage to himself.

112 Cong. Rec. 5022 (1966).

In 1974, Congress again amended the FECA by, inter alia, adding a provision that grants the government a lien on any third party recovery. Pub. L. No. 93-416, § 15, 88 Stat. 1147.[15] The purpose of that provision is to expedite repayment of benefits to the compensation fund. See S. Rep. 93-1081, 93d Cong., 2d Sess. 3, 11 (1974). By 1974, the FECA had been construed to permit the government to obtain reimbursement from any part of an employee's third party recovery, including a recovery alleged to consist only of damages for pain and suffering. See *United States* v. *Hayes*, *supra*. In addition, by 1974 no-fault statutes had been enacted in a number of states, including Colorado, Connecticut, Florida, Hawaii, Massachusetts, Michigan, New Jersey, New York, and Utah. During 1974 itself, Georgia, Kansas, Kentucky, Minnesota, and Pennsylvania enacted no-fault statutes. Despite this trend, Congress failed to include in the 1974 FECA amendments any provision that would curtail the government's right of

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[15] The amendment to 5 U.S.C. 8132 provides:

> No court, insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States.

reimbursement in cases in which an employee's third party recovery is limited by a no-fault statute.

**B. Reimbursement of the United States From All Elements of an Employee's Third Party Recovery Is Consistent With the Congressional Purposes Underlying Section 8132**

Reimbursement of the United States from an employee's third party recovery, whether or not it includes damages for economic losses, is consistent with the purposes underlying 5 U.S.C. 8132.

1. The court of appeals itself recognized (Pet. App. 5a) that a major purpose of the reimbursement provision is to keep the compensation fund solvent and to minimize the overall cost of the FECA program. Indeed, minimization of FECA costs is the foremost purpose of the reimbursement provision. In *Dahn* v. *Davis*, 258 U.S. 421, 430 (1922), this Court stated that Congress provided for subrogation and reimbursement in cases involving third party liability "not for the purpose of increasing [the employees'] compensation, but for the purpose of reimbursing the Government for payments made and of indemnifying it against other amounts payable in the future." See also *Galimi* v. *Jetco, Inc.*, 514 F.2d 949, 953 & n.4 (2d Cir. 1975); *Ostrowski* v. *Dep't of Labor, OWCP*, 653 F.2d at 231. That purpose is furthered by maximization of "the pool of dollars from which reimbursement must be made" (*Ostrowski* v. *Roman Catholic Archdiocese*, 479 F. Supp. 200, 205 (E.D. Mich. 1979), aff'd, 653 F.2d 229 (6th Cir. 1981)).

Congressional reports on the FECA system have stressed the continuing importance of the reimbursement provision in reducing FECA costs. In a comprehensive report on the FECA system, issued in 1976, the House Committee on Government Operations noted the importance of third party recoveries and recommended that the Department of Labor "streamline its

method of handling such claims and give them much more attention so as to enhance the amount of money recovered by the Government through third party actions rather than subsidizing compensation payments that rightfully should be made by private parties." H.R. Rep. 94-1757, 94th Cong., 2d Sess. 29 (1976). See also *id.* at 7. In a 1979 report, the Comptroller General emphasized the need to improve the efficiency of reimbursement through third party recoveries, thereby helping to offset escalating compensation costs. He noted that the rationale of the reimbursement provision "is that the taxpayers should not have to bear the costs of compensation when a private party is liable or at fault." *Report of the Comptroller General: Labor Department Is Strengthening Procedures to Recover Costs for Federal Employees' Injuries Caused by Third Parties* 1 (May 9, 1979). Indeed, with annual FECA compensation outlays now nearing $1 billion (see page 10 & note 2, *supra*), reimbursement from third party recoveries is increasingly important to the financial viability of the program.

Requiring reimbursement from any element of an employee's damages award, even when a state no-fault statute limits recoveries to damages for noneconomic losses, clearly serves the purpose of minimizing the overall cost of the FECA program. Sixteen states currently have some form of full-fledged no-fault recovery scheme for automobile accidents; all of these schemes appear to limit third party tort recovery in connection with such accidents.[16] While we are unable to calculate

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[16] See Colo. Rev. Stat. §§ 10-4-701 *et seq.* (1973 & Cum. Supp. 1983); Conn. Gen. Stat. Ann. §§ 38-319 *et seq.* (West Cum. Supp. 1983); D.C. Code Ann. §§ 35-2101 *et seq.* (Cum. Supp. 1983); Fla. Stat. Ann. §§ 627.730 *et seq.* (West Supp. 1983); Ga. Code Ann. §§ 33-34-1 *et seq.* (1982 & Cum. Supp. 1983); Hawaii Rev. Stat. §§ 294-1 *et seq.* (repl. 1976 & Supp. 1982); Kan. Stat. Ann. §§ 40-3101 *et seq.* (1981); Ky. Rev. Stat.

with any precision the amount at stake on a nationwide basis, it certainly would be enough to have a significant impact on the FECA compensation fund.[17]

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Ann. §§ 304.39-010 *et seq.* (repl. 1981 & Cum. Supp. 1982); Mass. Ann. Laws ch. 90, §§ 34A, 34M (Law. Co-op. 1975 & Cum. Supp. 1983); *id.*, ch. 231, § 6D (Law. Co-op. 1974); Mich Stat. Ann. §§ 24.13101 *et seq.* (Callaghan 1982 & Cum. Supp. 1983); Minn. Stat. Ann. §§ 65B.41 *et seq.* (West Cum. Supp. 1984); N.J. Stat. Ann. §§ 39:6A-1 *et seq.* (West 1973 & Cum. Supp. 1983); N.Y. Ins. Law §§ 670 *et seq.* (McKinney Cum. Supp. 1983); N.D. Cent. Code Ann. §§ 24-41-01 *et seq.* (repl. 1978 & Supp. 1983); Pa. Stat. Ann. tit. 40, §§ 1009.101 *et seq.* (Purdon Cum. Supp. 1983); Utah Code Ann. §§ 31-41-1 *et seq.* (repl. 1974 & Supp. 1983).

In addition, some states that do not have full-fledged no-fault statutes nevertheless have enacted certain no-fault features. See Ark. Stat. Ann. §§ 66-4014 *et seq.* (repl. 1980 & Cum. Supp. 1983); Del. Code Ann. tit. 21, § 2118 (Cum. Supp. 1981); Md. Ann. Code art. 48A, §§ 538 *et seq.* (repl. 1979 & Cum. Supp. 1983); N.H. Rev. Stat. Ann. §§ 264:15 *et seq.* (repl. 1982); Or. Rev. Stat. §§ 743.800 *et seq.* (repl. 1981); S.C. Code Ann. §§ 56.11.10 *et seq.* (Law. Co-op. 1976 & Cum. Supp. 1983); S.D. Codified Laws Ann. § 58-23-6 (rev. 1978); Tex. Ins. Code Ann. art. 5.06-3 (Vernon 1981); Va. Code §§ 38.1-380.1 *et seq.* (Cum. Supp. 1983); Wis. Stat. Ann. § 632.32 (West 1980 & Cum. Supp. 1983).

[17] As we indicated in our Petition (at 11), the Department of Labor informed us that at that time there were 48 pending third-party claims involving automobile accidents in Pennsylvania alone, with over $405,000 at stake. In addition, the Department was aware of 650 potential third party claims involving automobile accidents in Pennsylvania, with more than $6 million at stake. Since the Pennsylvania No-Fault Act provides for unlimited coverage of (and thus no tort recovery for) medical expenses, the government would be unable to recover any amount of FECA compensation it has paid for such expenses. The government would be able to obtain reimbursement for some portion of lost wages it has paid in connection with Pennsylvania automobile accidents, but only to the extent such payments to an individual exceed $15,000—the required no-fault coverage level for lost wages under the Pennsylvania No-Fault Act.

2. Requiring reimbursement from all elements of a third party recovery furthers another important purpose of the reimbursement provision—efficient administration of the FECA program. As the district court in *Ostrowski* explained (479 F. Supp. at 205), "by having only one standard for establishing the obligation to reimburse, Congress has eased the burden of administering FECA by avoiding the difficulties of distinguishing between the numerous statutory and common law causes of action found in the various states." A different rule—one that would require the Secretary of Labor to adjust the federal reimbursement scheme to accommodate various features of state law—would undermine the Secretary's ability to administer the FECA program in a uniform and efficient manner.

Adjustment of the federal scheme to take account of state no-fault provisions would create a significant administrative burden. Each state's no-fault system has its own peculiar features. The state no-fault statutes vary with respect to insurance coverage levels, extent to which tort liability is abolished, extent to which losses may be shifted through administrative mechanisms, thresholds below which tort actions may not be brought, subrogation rights, and a number of other features; in addition, state courts have not been uniform in their interpretations of no-fault provisions.[18] The Sec-

[18] For example, the New Jersey no-fault statute differs in various respects from the Pennsylvania statute, and differing bodies of case law have developed in each state. The New Jersey statute does not provide expressly for broad abolition of tort liability, as does the Pennsylvania statute. However, it includes a provision that evidence of amounts collectible or paid under no-fault coverage is inadmissible in a civil action for recovery of damages for bodily injury by an injured person. N.J. Stat. Ann. § 39:6A-12 (West 1973). The New Jersey Supreme Court has held that this provision prevents the injured person from recovering from a tortfeasor for amounts collectible or paid under the no-fault program and that the no-fault insurer

retary's right to reimbursement could vary from state to state if the federal statute had to be read in light of the operation of state law. The Secretary would be required to study the statutory scheme and developing case law in each no-fault state in order to determine how to administer the federal reimbursement provision in that state.[19] In view of the variations in no-fault statutes, it seems doubtful that the Secretary could count on administering the FECA reimbursement scheme in precisely the same manner in any two no-fault states.[20]

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may not be subrogated with respect to those amounts. *Aetna Insurance Co.* v. *Gilchrist Bros., Inc.*, 85 N.J. 550, 428 A.2d 1254 (1981). It is unclear whether the New Jersey courts would reach a similar conclusion in a case in which an employee had received workers' compensation benefits instead of no-fault benefits. Cf. *Sanner* v. *Government Employees Insurance Co.*, 150 N.J. Super. 488, 491, 494-495, 376 A.2d 180, 182, 184 (App. Div. 1977) (per curiam), aff'd, 75 N.J. 460, 383 A.2d 429 (1978) (per curiam) (dictum suggesting that the federal government could pursue a subrogation right against the tortfeasor to recoup benefits paid to military personnel under the Medical Care Recovery Act in connection with automobile accidents).

[19] The Secretary might also be required to study the statutes of states that have partial no-fault systems. See note 16, *supra*. For example, Delaware has what is sometimes refered to as a no-fault statute, Del. Code Ann. tit. 21, § 2118 (Cum. Supp. 1981), but it is generally viewed as having retained the traditional tort system of recovery. See *Burke* v. *Elliott*, 606 F.2d 375, 377 (3d Cir. 1979). Nevertheless, the government's right to reimbursement could be affected by Del. Code Ann. tit. 21, § 2118(g) (Cum. Supp. 1982), which provides that any person eligible for no-fault benefits may not plead in an action for damages against a tortfeasor those damages for which such benefits are available, whether or not the benefits are actually recoverable.

[20] Under the court of appeals' approach, the Secretary might even be required to distinguish among individual employees to determine how the no-fault scheme would affect reimbursement in a given case. The New Jersey Automobile Insurance Freedom of Choice and Cost Containment Act of 1984, ch. 362 (ap-

Administration of a uniform federal reimbursement requirement is clearly less burdensome than accommodation of each variation of state no-fault law. Under a uniform rule, the Secretary can use the same method to compute reimbursement for each of thousands of FECA claims filed each year.[21] Under the alternative interpretation embraced by the court of appeals, the Secretary would have to develop a separate set of reimbursement guidelines for each no-fault state; in addition, he might be forced to litigate in each no-fault state, both to clarify general principles under a particular no-fault scheme (since development of the no-fault case law is still at the beginning stages in some states) and to determine the application of those principles to FECA reimbursement. It is most unlikely that Congress intended to impose such administrative complexity in connection with a nationwide federal program that covers almost three million persons.

The court of appeals suggested (Pet. App. 7a-8a) that its interpretation of Section 8132 would not create a significant administrative burden because in the no-fault context it is clear that a third party recovery covers only noneconomic losses, so that it would be unnecessary to segregate different types of damages. In fact, depending on the seriousness of the injury and the level

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proved Oct. 4. 1983), requires, inter alia, that an individual be given the option of not purchasing no-fault coverage for nonmedical benefits (*i.e.*, loss of income, essential services, and funeral expenses); the option of entitling his insurer to reimbursement for medical expense benefits paid from any recovery for general damages (pain and suffering) sustained in an automobile accident and received by the insured (up to 20% of the amount of the recovery); and the option of limiting his right to sue for general damages. Lower insurance rates provide an incentive for individuals to choose one or more of these options.

[21] The Department of Labor advises us that in 1983 it identified over 13,000 work-related injuries of federal employees as having a potential for third party recovery.

of the ceiling on no-fault benefits under a particular state statute, some third party recoveries in cases like this one could include both economic and noneconomic elements. Moreover, as we have suggested, substantial administrative burdens can arise from the need to administer the reimbursement provision differently in each no-fault state, independent of the burden associated with apportionment of damages awards.

3. The court of appeals found it significant that reimbursement of the federal government was not necessary to prevent double recovery in this case, since the no-fault statute precluded respondent from recovering damages for basic economic losses in his third party tort action. Pet. App. 5a-7a. But there is little dispute that the government's right of reimbursement extends to some situations in which double recovery would not otherwise occur. See page 17 & note 6, *supra*. Indeed, the court of appeals acknowledged with its citation of *United States* v. *Hayes*, *supra* (Pet. App. 4a, 6a) that the government's right to reimbursement does not necessarily depend on the need to avoid double recovery in a given situation.

Moreover, if Congress had been concerned primarily with preventing double recovery, it could easily have drafted Section 8132 with precise language that would accomplish that goal. For example, Congress could have confined the government's right of reimbursement to an employee's damages for medical expenses, lost wages, and disability, or it could have expressly barred reimbursement from particular types of damages, such as pain and suffering. Congress's decision to write Section 8132 broadly suggests strongly that it was concerned less with double recovery than with minimizing the cost of the FECA program and the administrative burden on the Secretary—purposes that are clearly served by our reading of that provision.

**C. The Reasoning Offered by the Court of Appeals in Support of Its Interpretation of Section 8132 Cannot Withstand Scrutiny**

1. The court of appeals in effect concluded that Section 8132 must be read out of the FECA in cases like this one in order to accommodate the operation of the Pennsylvania no-fault scheme. The court was particularly troubled by what it perceived as the "unfairness" to federal employees that would result if the reimbursement provision were enforced in the no-fault context. The court explained that it rejected the Secretary's interpretation of Section 8132 "[i]n light of the recent growth of no-fault laws throughout the country and in view of the inherent hardship that will evolve upon those federal employees who, per chance, are subject to no-fault statutes" (Pet. App. 7a).

The court of appeals' "reinterpretation" of the FECA is inconsistent with this Court's admonition that comprehensive federal statutory compensation schemes are "not to be judicially expanded because of 'recent trends.'" *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, slip op. 11 (quoting *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 279 (1980)). In *Morrison-Knudsen*, the Court rejected the contention that employer contributions to union trust funds should be considered "wages" for purposes of computing compensation benefits under Section 2(13) of the LHWCA, 33 U.S.C. 902(13). Although the Court recognized that such fringe benefits have come to constitute a significant percentage of labor costs, it nevertheless held that alteration of the reasonable expectations of employers and their insurers is "a task for Congress." *Morrison-Knudsen*, slip. op. 12 (citing *J.W. Bateson Co.* v. *United States ex rel. Board of Trustees*, 434 U.S. 586, 593 (1978)). The Court noted that the LHWCA "was designed to strike a balance between the concerns of the longshoremen and harbor-

workers on the one hand, and their employers on the other" and that reinterpretation of the term "wages" would significantly "alter the balance achieved by Congress." *Morrison-Knudsen*, slip op. 11.

The FECA, like the LHWCA, is a comprehensive federal compensation scheme, under which Congress sought to strike a balance between the interests of employees and their employer, the federal government. See *Lockheed Aircraft Corp.* v. *United States*, slip op. 4; *Dahn* v. *Davis*, 258 U.S. at 431. The government's statutory right of reimbursement is a significant factor in that balance. See 258 U.S. at 430. Any "reinterpretation" of the FECA to limit that right of reimbursement in cases in which a state no-fault statute changes the scope of third party tort liability would alter the balance and therefore is a "task for Congress." *Morrison-Knudsen*, slip op. 12 (citations omitted). The New York legislature, confronted by broad statutory language that was interpreted by the courts to require reimbursement in the no-fault context, expressly revised the New York workers' compensation statute to take account of the operation of the New York no-fault statute (see pages 21-23 & note 11, *supra*). Unlike the New York legislature, Congress has not chosen to limit Section 8132, even though it has amended the FECA in other respects since the advent of state no-fault laws. In view of Congress's failure to act, there is no basis for the courts to limit the reach of Section 8132 in order to accommodate the state no-fault "trend."

2. In support of its interpretation of Section 8132, the court of appeals cited (Pet. App. 8a) the statement of the Senate committee that enactment of the 1974 FECA amendments would help the government achieve the position of "a model employer." S. Rep. 93-1081, 93d Cong., 2d Sess. 2 (1974).[22] In the court's

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[22] The court of appeals appears to have erred in citing the Senate report. The court referred to "S. Rep. No. 1124, 93rd Cong., 1st Sess., *reprinted in* (1974) U.S. Code Cong. & Ad.

view, this statement indicated that Congress intended that federal employees "be treated at least as well as their counterparts in private firms" (Pet. App. 8a). But the Senate committee's rhetorical statement hardly warrants the conclusion that the courts (as opposed to Congress itself) should revise the FECA reimbursement provision to create a compensation scheme that will fit perfectly with state no-fault schemes. In fact, the Senate committee's reference to the goal of making the federal government a "model employer" probably relates to the increases in benefit levels and improvements in timing of receipt of benefits that were the focus of the 1974 amendments, rather than to any feature of the reimbursement provision. To the extent Congress was concerned in 1974 with the government's right of reimbursement, it expressed that concern not by limiting reimbursement, but by strengthening that right through provision for a government lien on an employee's third party recovery.

In any event, we question the suggestion that requiring reimbursement in the no-fault context creates "unfairness" that would warrant restriction of reimbursement in a manner not provided by Congress. As we explained at pages 2-3, 10-11, *supra*, Congress, in enacting the FECA, gave injured federal employees the benefits of a speedy and certain recovery for work-related injuries, thus eliminating the barriers of sovereign immunity, proof of fault and absence of contributory negligence, and the expense and delay of prosecuting a negligence action. At the same time, Congress abolished any cause of action the employee otherwise might have against the government. 5 U.S.C. 8116(c). Congress presumably could have gone further and limited the employee's remedy for work-related injuries solely

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News 5341." Pet. App. 8a. However, it is S. Rep. 93-1081 that is reproduced at page 5341 of 1974 U.S. Code Cong. & Ad. News.

to FECA compensation by requiring (in exchange for FECA coverage) an unconditional assignment to the United States of any cause of action the employee might have against a third party. Under such a scheme, the government could choose whether to pursue the employee's cause of action and could use the entire recovery (in place of congressional appropriations) to replenish the compensation fund. Since Congress could have limited employees' rights more severely than it has under the existing scheme, it hardly seems "unfair" to require that an employee's third party recovery be applied first to make the government whole for the benefits it has paid out.

Moreover, Section 8132 itself contains a provision that mitigates the "unfairness" that may result from reimbursement. That section provides that an employee may retain one-fifth of any third party recovery, as well as an amount covering costs and a reasonable attorney's fee. Thus, even if the amount he recovers from a third party is less than the FECA compensation he has received, an employee is assured of obtaining a significant amount from a third party recovery.[23] Since the one-fifth provision ensures a rough sort of fairness to employees in any case of reimbursement, including a case in which an employee's recovery is diminished as a result of operation of a no-fault statute, there is no justification for the imposition of additional judge-made limitations on the government's right to reimbursement in the name of fairness.

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[23] Indeed, in this case there was no need even to reach the question of respondent's retention of one-fifth of the net tort recovery. Respondent recovered $8,500 from his settlement with the third party tortfeasor. The government sought reimbursement of only $1,600.24—leaving respondent with more than three-fourths of the proceeds of his third party settlement. See page 5 & note 1, *supra*.

3. To the extent there is any unfairness to federal employees in cases like this one, it results not from the FECA reimbursement provision, which predates by more than half a century all state no-fault schemes, but from the operation of the state laws themselves. As the district court in *Ostrowski* stated (479 F. Supp. at 206):

> Any discrepancy between the net recovery of an employee whose injury is covered by a no-fault statute and an employee whose injury is covered by common law or statute using only traditional tort concepts results not from a classification made by the Congress in FECA, but rather from the decisions of the individual states regarding the proper means of compensating personal injuries.

The court of appeals seemed to believe that when simultaneous application of the federal compensation statute and the state no-fault scheme would disadvantage an employee, the federal scheme must yield. The court cited the fact that workers' compensation carriers subject to Pennsylvania law can no longer recoup benefits from a third party recovery in connection with an automobile accident (see *Brunelli* v. *Farelly Bros.*, *supra*) and suggested that the federal statute could be construed in a similar manner to avoid conflict with the no-fault scheme. See Pet. App. 8a-9a.[24] But in requiring that a provision be read out of the federal statute in order to accommodate the operation of a state statute, the court has inverted the normal order in our federal-state system.

Of course, states are free to change the relationships among various parties subject to state control. More-

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[24] As we have noted above (pages 22-23, note 10), the state court in *Brunelli* was construing a subrogation provision in the context of a compensation carrier's attempt to intervene in the employee's third party action in order to assert a claim for the benefits it had paid, not an employer's independent claim under a reimbursement provision analogous to Section 8132.

over, it is entirely appropriate for the Pennsylvania courts to construe the Pennsylvania workers' compensation law in pari materia with the Pennsylvania no-fault statute. But states cannot alter the rights of the federal government under a federal statute without running afoul of the Supremacy Clause of the Constitution, Art. VI, Cl. 2. Congress is under no obligation to adapt its laws to the state scheme; nor can a state law be applied to defeat the objectives of a federal statute. See, *e.g.*, *Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (Jan. 11, 1984), slip op. 9; *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). In the absence of action by Congress, if courts conclude that accommodation between the federal and state schemes is necessary, they must achieve that result through interpretation or alteration of *state* law, not federal law. See, *e.g.*, *Perez* v. *Campbell*, 402 U.S. 637, 649-650 (1971); *Sperry* v. *Florida*, 373 U.S. 379, 384 (1963).[25]

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[25] Here the Pennsylvania no-fault statute might reasonably be construed by the state courts not to require deduction of FECA benefits (or benefits paid under other programs with mandatory repayment provisions over which the state has no control) from the no-fault insurer's obligation, at least to the extent the federal statute requires reimbursement from third-party recoveries for noneconomic losses. See *Ostrowski* v. *Roman Catholic Archdiocese*, 479 F. Supp. at 206. The Pennsylvania courts have distinguished between exhaustible and inexhaustible benefits under Pa. Stat. Ann. tit. 40, § 1009.206 (Purdon Cum. Supp. 1983) and have held that exhaustible benefits are not within the class of benefits that are to be subtracted from the basic loss benefits a no-fault insurer must pay. See, *e.g.*, *Tankle* v. *Prudential Property & Cas. Ins. Co.*, 306 Pa. Super. 57, 61, 452 A.2d 1, 3 (1982); *Erie Insurance Exchange* v. *Sheppard*, 39 Pa. Commw. 30, 394 A.2d 1075 (1978). FECA benefits could be treated as exhaustible benefits under the Pennsylvania no-fault scheme without doing violence to either the federal statute or the state statute. Cf. *Bell* v. *Dep't of La-*

There is no justification for reading a provision out of a federal statute on the ground that a subsequently-enacted state statute does not mesh perfectly with the federal statutory scheme, as the court of appeals did here. Any alteration of Section 8132 to accommodate the effects of the Pennsylvania statute or any other state no-fault scheme is a task for Congress alone. In the absence of any indication that Congress has undertaken such an alteration, the right of the federal government to reimbursement of its compensation payments from respondent's third party recovery remains intact.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
*Solicitor General*
RICHARD K. WILLARD
*Acting Assistant Attorney General*
KENNETH S. GELLER
*Deputy Solicitor General*
CAROLYN F. CORWIN
*Assistant to the Solicitor General*
WILLIAM KANTER
FREDDI LIPSTEIN
*Attorneys*

MARCH 1984

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bor, 560 F. Supp. 515, 523-524 (E.D. Pa. 1983), appeal pending, Nos. 83-1223 and 83-1269 (3d Cir.).

## APPENDIX
## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Supremacy Clause of Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Federal Employees' Compensation Act, 5 U.S.C. 8131, provides:

> (a) If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability on a person other than the United States to pay damages, the Secretary of Labor may require the beneficiary to—
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> (1) assign to the United States any right of action he may have to enforce the liability or any right he may have to share in money or other property received in satisfaction of that liability; or
>
> (2) prosecute the action in his own name.
>
> An employee required to appear as a party or witness in the prosecution of such an action is in an active duty status while so engaged.
>
> (b) A beneficiary who refuses to assign or prosecute an action in his own name when required by the Secretary is not entitled to compensation under this subchapter.
>
> (c) The Secretary may prosecute or compromise a cause of action assigned to the United States. When the Secretary realizes on the cause of action, he shall deduct therefrom and place to the credit of

the Employee's Compensation Fund the amount of compensation already paid to the beneficiary and the expense of realization or collection. Any surplus shall be paid to the beneficiary and credited on future payments of compensation payable for the same injury. However, the beneficiary is entitled to not less than one-fifth of the net amount of a settlement or recovery remaining after the expenses thereof have been deducted.

(d) If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in the Panama Canal Company to pay damages under the Law of a State, a territory or possession of the United States, the District of Columbia, or a foreign country, compensation is not payable until the individual entitled to compensation—

(1) releases to the Panama Canal Company any right of action he may have to enforce the liability of the Panama Canal Company; or

(2) assigns to the United States any right he may have to share in money or other property received in satisfaction of the liability of the Panama Canal Company.

The Federal Employees' Compensation Act, 5 U.S.C. 8132, provides:

> If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as the result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payable to him for the same injury. No

court, insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States. The amount refunded to the United States shall be credited to the Employees' Compensation Fund. If compensation has not been paid to the beneficiary, he shall credit the money or property on compensation payable to him by the United States for the same injury. However, the beneficiary is entitled to retain, as a minimum, at least one-fifth of the net amount of the money or other property remaining after the expenses of a suit or settlement have been deducted; and in addition to this minimum and at the time of distribution, an amount equivalent to a reasonable attorney's fee proportionate to the refund to the United States.

20 C.F.R. 10.503 provides:

If an injury for which benefits are payable under the Act is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, and, as a result of suit brought by the beneficiary or by someone on his or her behalf, or as a result of settlement made by him or her or on his or her behalf in satisfaction of the liability of such other person, the beneficiary shall recover damages or receive any money or other property in satisfaction of the liability of such other person on account of such injury or death, the proceeds of such recovery shall be applied as follows:

(a) If an attorney is employed, a reasonable attorney's fee and cost of collection, if any, shall first be deducted from the gross amount of the settlement;

(b) The beneficiary is entitled to retain one-fifth of the net amount of the money or other property remaining after the expenses of a suit or settlement have been deducted, plus an amount equiva-

lent to a reasonable attorney's fee proportionate to any refund to the United States;

(c) There shall then be remitted to the Office, the benefits which have been paid on account of the injury, which shall include payments made on account of medical or hospital treatment, funeral expense, and any other payments made under the Act on account of the injury or death;

(d) Any surplus then remaining may be retained by the injured employee or his dependents, and the net amount of damages received by the beneficiary shall be credited against future payment of benefits to which the beneficiary may be entitled under the Act on account of the same injury or death.

The Pennsylvania No-Fault Motor Vehicle Insurance Act, Pa. Stat. Ann. tit. 40, § 1009.206(a) (Purdon Cum. Supp. 1983) (footnotes omitted), provides:

> Except as provided in section 108(a)(3) of this act, all benefits or advantages (less reasonably incurred collection costs) that an individual receives or is entitled to receive from social security (except those benefits provided under Title XIX of the Social Security Act and except those medicare benefits to which a person's entitlement depends upon use of his so-called "life-time reserve" of benefit days) workmen's compensation, any State-required temporary, nonoccupational disability insurance, and all other benefits (except the proceeds of life insurance) received by or available to an individual because of the injury from any government, unless the law authorizing or providing for such benefits or advantages makes them excess or secondary to the benefits in accordance with this act, shall be subtracted from loss in calculating net loss.

The Pennsylvania No-Fault Motor Vehicle Insurance Act, Pa. Stat. Ann. tit. 40, § 1009.301 (Purdon Cum. Supp. 1983) (footnote omitted), provides:

**(a) Partial abolition.**—Tort liability is abolished with respect to any injury that takes place in this State in accordance with the provisions of this act if such injury arises out of the maintenance or use of a motor vehicle, except that:

(1) An owner of a motor vehicle involved in an accident remains liable if, at the time of the accident, the vehicle was not a secured vehicle.

(2) A person in the business of designing, manufacturing, repairing, servicing, or otherwise maintaining motor vehicles remains liable for injury arising out of a defect in such motor vehicle which is caused or not corrected by an act or omission in the course of such business, other than a defect in a motor vehicle which is operated by such business.

(3) An individual remains liable for intentionally injuring himself or another individual.

(4) A person remains liable for loss which is not compensated because of any limitation in accordance with section 202(a), (b), (c) or (d) of this act. A person is not liable for loss which is not compensated because of limitations in accordance with subsection (e) of section 202 of this act.

(5) A person remains liable for damages for non-economic detriment if the accident results in:

(A) death or serious and permanent injury; or

(B) the reasonable value of reasonable and necessary medical and dental services, including prosthetic devices and necessary ambulance, hospital and professional nursing expenses incurred in the diagnosis, care and recovery of the victim, exclusive of diagnostic x-ray costs and rehabilitation costs in excess of one hundred dollars ($100) is in excess of seven hundred fifty dollars ($750). For purposes of this subclause, the reasonable value of hospital room and board shall be the amount determined by the Department of Health to be the

average daily rate charged for a semi-private hospital room and board computed from such charges by all hospitals in the Commonwealth; or

(C) medically determinable physical or mental impairment which prevents the victim from performing all or substantially all of the material acts and duties which constitute his usual and customary daily activities and which continues for more than sixty consecutive days; or

(D) injury which in whole or in part consists of cosmetic disfigurement which is permanent, irreparable and severe.

(6) A person remains liable for injury arising out of a motorcycle accident to the extent that such injury is not covered by basic loss benefits payable under this act, as described in section 103.

**(b) Nonreimbursable tort fine.**—Nothing in this section shall be construed to immunize an individual from liability to pay a fine on the basis of fault in any proceeding based upon any act or omission arising out of the maintenance or use of a motor vehicle: Provided, That such fine may not be paid or reimbursed by an insurer or other restoration obligor.

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No. 83-838

IN THE

# Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,
*Petitioner*

*v.*

PAUL B. LORENZETTI

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## BRIEF FOR RESPONDENT

Charles Sovel, Esq.
FREEDMAN AND LORRY, P.C.
5th and Chestnut Streets
Philadelphia, PA 19106
(215) 925-8400

*Attorneys for Respondent*

PACKARD PRESS - LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

## QUESTIONS PRESENTED

1. Is not the right of the United States to assert a subrogation lien for benefits paid to a federal employee under the Federal Employees' Compensation Act, 5 U.S.C. §8132, against an employee's third-party recovery subject to the provisions of the State substantive law governing that third-party recovery?

2. May the United States assert a subrogation lien for medical expenses and compensation benefits paid to a federal employee under the Federal Employees' Compensation Act, 5 U.S.C. §8132, against the employee's third-party tort recovery in an action subject to the Pennsylvania No-Fault Insurance Law, 40 P.S. §1009.101 et seq., where the Pennsylvania No-Fault Insurance Law bars the employee from recovering such items as damages in his third-party tort action?

3. Is not the United States' right to assert a subrogation lien against an employee's third-party recovery in an action subject to the Pennsylvania No-Fault Insurance Law barred by that law's provision barring subrogation with respect to payments considered to be No-Fault benefits?

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## BRIEF FOR RESPONDENT

### STATEMENT

Respondent is a special agent for the Federal Bureau of Investigation. In November of 1977, and for several years both prior and subsequent thereto, he was stationed in Philadelphia. On November 21, 1977, while operating an automobile owned by petitioner, United States of America, he was involved in an automobile accident which occurred in the City of Philadelphia. As a result of that accident, he suffered personal injuries which necessitated extensive medical treatment and caused him to lose numerous days from work.

Pursuant to the provisions of the Federal Employees Compensation Act, 5 U.S.C. Sec. 8101 et seq., the United States of America paid the medical expenses incurred by the respondent and also paid him wage benefits for the period that he lost from his employment. These medical expenses and wage benefits (after deduction of an allowance for counsel fees which is not in dispute) totaled $1,620.24.

Subsequent to the accident, respondent instituted a third-party action in the Court of Common Pleas of Philadelphia County against the driver of the automobile that struck the automobile that he was operating at the time of the accident. Prior to that action being called for trial, counsel for defendant in the Court of Common Pleas action filed a motion for an order barring respondent from presenting evidence of medical expenses and wage losses as elements of damages in the third-party action on the grounds that such payments were no-fault benefits under the Pennsylvania no-fault insurance law and could not be proven or recovered in a third-party action against the driver of the automobile which struck his vehicle. The court indicated that this motion would be granted, as there was no dispute that the law of Pennsylvania barred recovery of such items as damages in a tort action subject to the no-fault law, see *Brunelli v. Farelly Bros.*, 266 Pa. Super. 23 (1979).

When counsel for defendant in the Common Pleas Court action filed the motion to preclude proof of the medical expenses and wage losses as damages, counsel for respondent advised the court that, notwithstanding the provisions of Pennsylvania law, the United States still was insisting upon asserting a subrogation lien against the proceeds of any recovery made in the tort action. The court thereupon signed an Order to Show Cause which was served on the United States to appear in the Court of Common Pleas and show cause why the motion to preclude should not be granted. Counsel for the United States appeared in that proceeding and submitted a brief but no formal order was entered. However, there was a conference in chambers in which the court indicated that the motion to preclude would be granted. Thereafter, plaintiff settled the third-party action for the sum of Eight Thousand Five Hundred Dollars ($8,500.00), with such settlement being negotiated on the understanding of all involved that medical expenses and wage losses would *not* be provable in the third-party tort action.

Following consummation of the settlement, respondent filed the instant proceeding seeking a declaratory judgment as to whether the proceeds of this settlement were subject to the subrogation lien being asserted by the United States of America.

Since the foregoing facts were not in dispute, the District Court viewed the proceeds of the settlement as having been paid *solely* on the basis of the pain and suffering caused to respondent as a result of the accident, and not in reimbursement of any wages or medical expense. Thus, the District Court noted (Pet. App. 14a):

> "Thus, had the case gone to trial, plaintiff's proof of damages would have been limited to non-economic losses as defined by the No-Fault Act. The parties settled the case, however, for $8,500.00. In view of the applicable provisions of the No-Fault Act, *the settlement must be attributed solely to plaintiff's claim for pain and suffering.*" (Emphasis supplied).

Notwithstanding that the settlement was attributed solely to the respondent's claim for pain and suffering, the district court ruled that respondent was obligated to reimburse the United States out of this recovery for any expenses incurred by the United States for medical expenses and compensation payments. On appeal, the Court of Appeals for the Third Circuit reversed, holding that Congress, in enacting the Federal Employee's Compensation Act, intended that all federal employees "be treated in a fair and equitable manner" (Pet. App. 7A), that the result for which the government was contending was manifestly unfair to federal employees who were not being treated equally with their state counterparts, and that there was no reason why the Act could not be interpreted in a manner analogous to the interpretation given the Pennsylvania Workmen's Compensation Act under which there is no subrogation in cases covered by the Pennsylvania no-fault insurance act (Pet. App. 9A).

## SUMMARY OF ARGUMENT

1. The right of the United States to be reimbursed for compensation payments paid to a federal employee arises only where the federal employee has recovered "damages" from a third-party. The term "damages" as used in 5 U.S.C. 8132 has several possible meanings and the court below therefore correctly looked at the statute's purpose and legislative history in order to ascertain its correct meaning.

2. 5 U.S.C. 8131 and 8132 are subrogation provisions, with 5 U.S.C. 8132 merely providing a means for enforcing the right of subrogation created in 5 U.S.C. 8131. The government's rights under 5 U.S.C. 8131 and 8132 can rise no higher than the rights of the employee involved. Therefore, 5 U.S.C. 8132 cannot be interpreted as creating an independent right in the government to recover compensation payments from an employee where the employee was barred from recovering such amounts in a third-party action.

3. The government's interpretation of 5 U.S.C. 8132 as permitting it to recover medical expenses and wage loss benefits paid to an employee as workmen's compensation benefits out of the proceeds of an employee's third-party recovery when these items were not provable as damages in the third-party action, is discriminatory and manifestly unfair to federal employees, and the court below was correct in so ruling.

4. Provisions in state no-fault insurance laws limiting the right of individuals injured in motor vehicle accidents to recover damages in third-party litigation are valid and the subrogation provisions of the Federal Employees' Compensation Act, 5 U.S.C. 8131 and 8132 should be interpreted in a manner consistent with these laws.

## ARGUMENT

**The court below correctly ruled that the United States could not assert a lien against an injured employees' third party recovery for amounts which the employee was not entitled to recover in the third party action.**

The Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq*. (hereafter FECA), establishes a comprehensive workers' compensation program for federal employees. In its essential structure and design (as relates to the instant litigation) it is similar to other workmen's compensation statutes, both state, *e.g*., Pennsylvania Workmen's Compensation Act, 77 Purdon's Statutes Annotated, Sec. 1 *et seq*., and federal, *e.g*., the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq*. and while comprehensive, is neither more nor less comprehensive than these other statutory programs.

Essentially, FECA, like other compensation programs, provides for payment by an employer, in this case the United States, to an employee for certain losses suffered by the employee as a result of a work related injury, 5 U.S.C. 8102. These payments are referred to as benefits. The employee is entitled to receive these benefits immediately and without regard to who may have been at fault in causing his injuries. As the *quid pro quo* for the right to receive these benefits, the employee gives up his right to sue his employer (*i.e*., the United States), and the employer's obligation to pay compensation benefits becomes the employer's exclusive liability to the injured employee with respect to the injuries involved, 5 U.S.C. 8116(c).

Compensation statutes, including FECA, universally recognize that work related injuries may arise under circumstances where a third party (*i.e*., someone other than the employer) may be obligated to respond in damages to the injured employee. Absent some reason to limit the third party's liability to the injured employee, compensation statutes, including FECA, traditionally have preserved the right of the injured employee to seek recovery against such a third party tort-feasor.

In such a third party action, the damages recoverable by the employee usually, but not always (as in cases where no fault

or similar legislation is involved), include the employee's medical expenses and wage losses, items which duplicate payments the employee received as compensation benefits. If permitted to retain these amounts, the employee will have received a double recovery to the extent of his compensation benefits.

It is readily apparent in these circumstances that the negligent conduct of the third party tort-feasor, in addition to causing injury to the employee, also will cause harm to the employer who is called upon to pay compensation benefits to the injured employee by reason of the third party tort-feasor's negligent conduct. The universal solution in these circumstances has been to permit the employee to pursue his claim against the third party, while imposing a lien on that recovery in favor of the employer for amounts paid by the employer as compensation to the extent such payments are included in the damages recovered by the employee in his third party action. This compensation lien may arise from expressed statutory enactment[1] or by virtue of judicial decision,[2] but in either event always has been based upon the principle of subrogation, with the lien attaching to any duplicate recovery made in the third party litigation, *e.g.*, *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 79, 63 L Ed 2d 215 221 (1980).

It is the implementation of the principle of subrogation through the vehicle of the compensation lien that the desired balance between the relative interests of the employer and the employee is achieved. The employee is assured recovery of an amount equal to his recoverable damages or his compensation benefits, whichever amount is *greater*, while the employer is assured of paying no more than an amount equal to its compensation liability, and may end up paying less to the extent that the

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1. *E.g.*, 5 U.S.C. 8131 and 8132 for FECA; Pennsylvania Workmen's Compensation Act, 77 Purdon's Statutes Annotated, Sec. 671, for Pennsylvania.

2. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, has no specific provision giving the employer a compensation lien, but the existence of a lien for compensation payments has been read into the Act by judicial decision, see *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 71, 79, 63 L Ed 2d 215, 221 (1980).

third party litigation is successful and repayment is made on the compensation lien.

It is this balancing of the relative interests of the United States, as an employer, and its employees which the government is trying to upset in the instant case, and, notwithstanding the government's criticism of the court below for supposedly altering the statutory balance between the federal government and its employees (Brief for the United States, page 5), it actually is the United States that is seeking to upset a long standing statutory balance, and, while so doing, to impose upon its employees a result which is manifestly unfair and clearly contrary to the historical approach of Congress in matters of this nature.

Stripped of all surplusage, the position of the government in the instant case is that 5 U.S.C. 8132 is not based on the principle of subrogation, but rather invests in the government the right to recover its compensation payments out of an employee's third party recovery, even where the payments for which reimbursement is sought are not recoverable in the third party action, Brief for the United States, f.n. 3, pp. 13-14. The government further contends, as a necessary predicate to its position, that modifications of state tort law under which the third party recovery is made, such as no-fault legislation, cannot affect the government's right to reimbursement of its compensation payments, and to the extent that such modifications would do so, they are invalid. The court below correctly rejected both these contentions.

Congress never has sought to dictate to the states with respect to matters of state tort law. Quite to the contrary, in waiving the defense of sovereign immunity and subjecting the federal government to liability under the Federal Tort Claims Act, 28 U.S.C. 2674 (1976), Congress consciously chose to utilize state substantive tort law, with its many variations, as a the basis for establishing liability against the federal government, see *Heusle v. National Mutual Insurance Co.*, 628 F.2d 833, 838 (3rd Cir. 1980). Nor did Congress, in the provisions in FECA providing for subrogation or assignment (whatever one may choose to call 5 U.S.C. 8131 and 8132), attempt to dictate or define the circumstances under which a third party recovery

could be made or, of significance to the instant case, dictate the measure of damages applicable in such a third party action. Rather, FECA, both in 5 U.S.C. 8131 and 5 U.S.C. 8132, refers only to ". . . circumstances creating a *legal liability* on a person other than the United States to pay damages . . ." (Emphasis supplied), with such legal liability being determined by other substantive law provisions.

No area of the law has been more the subject of continuing growth and change, whether by reason of judicial decision or statutory enactment, than has been the field of tort law. Recent years have witnessed both the expansion of tort remedies in some areas and the contraction of tort remedies in others. One need only refer to the field of product liability law and the substitution of comparative negligence for contributory negligence as examples of expanding tort liability, and limitations on the liability of charitable institutions[3] and no-fault insurance laws, such as involved here, as examples of the narrowing of tort liability. If any thing is certain in the field of tort law, it is the certainty of change. Yet the basic principle with respect to compensation liens has remained the same — the compensation lien is subject to whatever limitations are imposed on the employee's third party right of recovery, and if a particular item of damages cannot be recovered in the third party litigation, then the employer cannot assert a lien for such payment as the employer's rights can rise no higher than the rights of the employee from they are derived.[4]

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3. As an example, under New Jersey law, the liability of a charitable institution, including hospitals, for accidental injury is limited to $10,000.00, see NJSA 2A: 53A-8.

4. The government argues in its brief, f.n. 3, pp. 13-14, that 5 U.S.C. 8132 is not a subrogation provision, but rather creates an "independent right of reimbursement from whatever amount" the employee is able to recover in his third party action. The government further argues in its brief, text at p. 15, that its interpretation is supported by the provision in 5 U.S.C. 8131 authorizing the government to require the employee to assign his third party action to the government. These arguments are difficult to comprehend. Clearly, the United States can no more require an employee to assign a claim he does not have than it can be subrogated to a claim that does not exist. 5 U.S.C. 8131 and

Under the Pennsylvania No-Fault insurance law involved in the instant case, a person injured in an automobile accident no longer is entitled as a *matter of right* to sue a negligent third party to recover damages for his injuries, see 40 Purdon's Statutes Annotated, Sec. 1009.301(a). Rather, the injured person is limited in the first instance to the recovery of no-fault benefits. If the person was injured in the course of employment so as to be entitled to receive workmen's compensation benefits, then the receipt of such workmen's compensation benefits is deemed the receipt of no-fault benefits.[5] *Only* if the nature of the injuries suffered are such as to meet certain threshold requirements is the injured person entitled to bring suit against a negligent third party, see 40 Purdon's Statutes Annotated, Sec. 1009.301(a), and, if such suit is brought, the damages recoverable are *limited* to those losses *not* covered by the receipt of no-fault benefits, or workmen's compensation benefits, as the case may be. Amounts received as no-fault benefits may not be recovered in such third party action and subrogation by the party paying no-fault benefits is specifically barred, see 40 Purdon's Statutes Annotated, Sec. 1009.111(a), *Brunelli v. Farelly Bros.*, 266 Pa. Super 23 (1979).

The no-fault insurance law works a fundamental change in the legal remedies available to persons injured in motor vehicle accidents. It replaces the right to sue a negligent third party for *all* damages resulting from a motor vehicle accident with a two pronged remedy consisting of no-fault benefits plus the right to sue for those damages not covered by no-fault benefits (assuming the threshold requirements are met). Under the Pennsylvania no-fault system an injured party is guaranteed *both* his no-

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8132 merely provide alternative means by which the government can *enforce* its compensation lien. The nature and amount of the lien depends on the employee's substantive right of recovery.

5. The statutory language is rather convoluted. The no-fault act provides that payments received as workmen's compensation benefits are to be *subtracted* from the employee's basic loss in calculating his net losses, 40 Purdon's Statutes Annotated, Sec. 1009.206(a). The effect of this subtraction usually is to reduce the net loss to zero, thus giving the no-fault carrier the benefit of any payments made as workmen's compensation.

fault benefits *and* the right to bring suit for a limited third party recovery in lieu of the right to bring suit for an unlimited third party recovery.

It is in the context of the foregoing provisions of the Pennsylvania no-fault insurance law that the position of the government in the instant case can best be understood and the manifest unfairness of this position to which the court below referred (Pet. App. 7a), readily becomes apparent. Under the government's position in the instant case, a federal employee injured in a motor vehicle accident subject to the Pennsylvania no-fault insurance law would *not* be entitled to retain his no-fault benefits; rather, he would have to pay his no-fault benefits back to the government out of a third party recovery which did *not* include them. Thus, a federal employee would recover substantially less (measured by the amount of his workmen's compensation benefits) than would a non-federal employee injured under exactly the same circumstances. In addition, a federal employee in the State of Pennsylvania, or in any other state with similar no-fault legislation, would recover *less* than a federal employee in a state which does not have no-fault legislation and in which medical expenses and full wage loss are recoverable items of damages in third party litigation. Such a result hardly fulfills the Congressionally mandated role of the government as a model employer (Pet. App. 8a).

Ignoring the harshness of its position and the patently discriminatory treatment of federal employees which its position embodies, the government argues that the "plain meaning" of 5 U.S.C. 8132 requires the interpretation for which it is arguing. Nothing could be more incorrect. Indeed, to the extent that 5 U.S.C. 8132 can be said to have any "plain meaning" it is a meaning which is far different from that being argued by the government.

5 U.S.C. 8132 provides in pertinent part:

> "If an injury or death for which compensation is payable . . . is caused under circumstances *creating a legal liability* in a person other than the United States to pay *damages*, and a beneficiary entitled to compensation from the

> United States for that injury . . . receives money or other property in satisfaction of *that liability* as the result of suit or settlement . . . shall refund to the United States the amount of compensation paid by the United States . . ." (Emphasis supplied).

The statute, by its terms, applies to situations where there is a "liability" on a person *other* than the United States to pay "damages." These two key words — "liability" and "damages" — are not specifically defined. The term "liability" is part of the phrase "under the circumstance creating a legal liability" and clearly refers to situations where the events under which the death or injury occurred give rise to a *cause of action* against a party *other* than the United States.

The content of the term "damages" is not so easily ascertained. One possible interpretation is that it is being used in a general sense, referring to *all* damages that might be recovered as part of the "cause of action" to which the death or injury for which compensation was paid gave rise. While this is, perhaps, the most literal interpretation of 5 U.S.C. 8132, it also is the most unacceptable one, for a cause of action arising from events under which a particular death or injury might have occurred, might include a variety of damage claims, including claims for property damage.

Consider the situation where a government employee is driving his own automobile in the course of his employment and the automobile is damaged in a compensable accident, or the employee is wearing a watch which is damaged in the accident. These claims for property damage would be part of his cause of action arising from the events giving rise to the payment of compensation, yet no one would seriously contend that Congress intended that any recovery the employee might make for these items of property damage should be applied to repaying the government's compensation lien.[6]

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6. At several places in the government's brief there is language which suggests that the government is contending that it is entitled to be reimbursed out of recoveries for property damage. Thus, at page 14 of the government's brief it is stated that the right to reimbursement "encompasses *all* damages re-

The government's position in the instant case must fail because it is predicated on an alleged "plain meaning" of 5 U.S.C. 8132, when, in fact the statute has no plain meaning. It has no plain meaning because the word "damages" as used in the statute has at least three possible meanings, all of which differ significantly in their consequences. These three possible meanings are: (1) "Damages" means *all* damages, including property damages recoverable as part of the cause of action against the third party. (2) "Damages" means those items of damages awarded for bodily personal injury arising from the cause of action against the third party. (3) "Damages" refers to those items of damage for bodily personal injury which are recoverable in the action against the third party for which compensation benefits were paid.

Given these three possible reasonable meanings of the word "damages" as use in the the statute, the "plain meaning" rule is of little help and resort to other means of ascertaining legislative intent is both necessary and appropriate. The court below adopted interpretation (3), approaching the problem of statutory interpretation in a manner which was both scholarly and impeccably correct. The court looked to the purposes which Congress sought to accomplish with the enactment of FECA, *cf. Rose v. Lundy*, 455 U.S. 509, 517 (1982), to the published legislative history, and to the historical development of no-fault legislation as it related to FECA.

From the historical viewpoint, the court below noted that 5 U.S.C. 8132 was enacted *prior* to the advent of no-fault legislation and, therefore, the unique problems created by no-fault

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NOTE — *(Continued)*

covered from third parties," (Emphasis supplied), at page 16 the statement is made that the right to reimbursement extends to "any third party recovery, *regardless* of the elements of damages that make up that recovery," (Emphasis supplied), and at page 17, "Section 8132 requires an employee to reimburse the government from *any* damage award," (Emphasis supplied). We do not understand the government to actually be contending that it is entitled to be reimbursed out of property damage recoveries. At the same time, however, this loose phraseology in the government's own brief serves to further demonstrate the futility of trying to read some "plain meaning" into 5 U.S.C. 8132.

legislation in implementing 5 U.S.C. 8132 could not have been considered by Congress when this provision was last amended. (Pet. App. 6a-7a). Accordingly, it was incumbent upon the court to analyze the purposes underlying the statute in order to ascertain its proper scope.[7]

The court then took note of the legislative history which disclosed the when Congress last amended FECA in 1973, it specifically stated that its purpose was to insure ". . . that injured or disabled employees of all covered departments or agencies . . . be treated in a *fair and equitable* manner," citing S. Rep. No. 416, 93rd Cong., 1st Sess., *reprinted in* (1974) U.S. Code Cong. & Ad. News 5341-43. (Emphasis supplied) (Pet. App. 7a). Applying this "fair and equitable" test, the court below then concluded (for the reasons previously set forth in this brief):

> "The result now sought by the government converts a law which was originally intended to assist federal employees into one that is manifestly unfair to those same individuals. In light of the recent growth of no-fault laws throughout the country and in view of the inherent hardship that will evolve upon those federal employees who, per chance, are subject to no-fault statutes, it is incumbent on this court to reject the government's wide-ranging interpretation of §8132."

The court below then concluded by referring to the expressed hope of Congress that FECA would help the government in achieving its goal of becoming a "model employer", see S. Rep. No. 1124, 93rd Cong., Sess., (1974) U.S. Code Cong. & Ad. News 5341, (Pet. App. 8a), and stated in summary:

> "There is absolutely no reason in either the legislative history of FECA or in the interpretive regulations promulgated by the Secretary of Labor, as to why FECA cannot be viewed in an analogous fashion (referring to the Pennsylva-

7. The fact that no-fault legislation was not in existence, nor even on the horizon, when 5 U.S.C. 8132 was last amended (in 1966) is a further and highly persuasive reason for not placing undue emphasis on any claimed "plain meaning" attributed to the statutory language.

nia decisions precluding subrogation with respect to basic loss benefits under the no-fault statute, see *Pierce v. Kinsey*, 18 D&C 3rd 531 (1981)). *Such a reading of §8132 would put federal employees on an equal footing with their counterparts in private industry and most importantly, it would allow for a fair result under the terms of the statute,*" (Emphasis supplied).

In an effort to bolster its position, the government cities case holding that awards for non-economic lossess, such as pain and suffering, may be applied to satisfy compensation liens, *e.g.*, *Haynes v. Rederi A/S Aladdin*, 362 F.2d 345 (5th Cir. 1966), cert. denied, 385 U.S. 1020 (1967), and other cases cited at page 9 of the Brief for the United States. However, this argument misses the mark, for in the cases cited, unlike the instant case, the items making up the compensation lien, medical expenses and wage losses, *were provable items of damages in the third party litigation*. In *Haynes v. Rederi A/S Alladdin*, supra, as a result of a 50% reduction for comparative negligence, the employee's third party recovery was reduced substantially, and he sought to pass on a portion of that reduction to the employer through a proportional reduction of the compensation lien. This was properly denied because the employee *did* receive the benefit of his full third party recovery, albeit a reduced recovery because of his own negligence. Despite the reduction for comparative negligence, the recovery that he was awarded did include his medical expenses and wage loss *to the extent that he was entitled to recover these items*. In the instant case, however, by virtue of the provisions of the no-fault law, respondent's third party recovery did *not* include his medical expenses and wage loss.

*United States v. Rogers*, 658 F.2d 296 (5th Cir. 1981), cited at page 18 of the Brief for the United States, is distinguishable for a totally different reason. There payments were made to an employee under the Railroad Unemployment Insurance Act, 45 U.S.C. 351 *et seq.*, with respect to injuries incurred in an automobile accident. However, it does not appear that these payments were in lieu of no-fault payments, and under Georgia law

which was applicable to that case, an employee is entitled to collect *both* no-fault benefits *and* workmen's compensation benefits *at the same time*, unless the employer is obligated to pay for the no-fault benefits, see Official Code of Georgia, Annotated, Vol. 25, Title 33-34-8. It does not appear that the effect of the repayment of the lien in *United States v. Rogers*, supra, operated to deprive Rogers of the benefit of a no-fault recovery, as would the government's position in the instant case.

Finally, the government's argument that the effect of the decision below would be to impose unreasonable administrative burdens on the government is disingenuous. An unfair or discriminatory interpretation of a law is not to be countenanced simply because it is easier to administer than a fair and non-discriminatory interpretation. Moreover, it is difficult to see how the government's proposed interpretation will make any appreciable difference in administering the Act because the third party right of recovery of federal employees still will depend on the various laws of the 50 states and those responsible for administering FECA still will have to gain and maintain familiarty with these laws.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

CHARLES SOVEL
Freedman and Lorry, P.C.
*Attorneys for Respondent*

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No. 83-838

# In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

*v.*

PAUL B. LORENZETTI

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## TABLE OF AUTHORITIES

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## REPLY BRIEF FOR THE UNITED STATES

In our opening brief, we showed that the plain language, as well as the legislative history and purpose, of 5 U.S.C. 8132 indicate that a federal employee who receives Federal Employees' Compensation Act benefits for injuries suffered in the course of his employment must reimburse the United States out of any damages recovered from a negligent third party. Respondent makes little or no effort to answer most of our arguments. Since many of respondent's contentions were anticipated in our principal brief, only a short reply is required.

1. In our opening brief (at 17-23) we cited a number of cases to show that under federal compensation schemes and most state workers' compensation laws an employer's right to reimbursement is not limited to particular elements of damages and that the right exists even when there has been no duplicate recovery by the employee. Respondent nevertheless asserts, without citation of authority, that the "universal solution" (Br. 6), or the "basic principle" (*id.* at 8), in

this area includes limitation of the employer's lien when the employee himself is unable to recover certain elements of damages in his third party action. Those generalizations are simply unfounded.[1]

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[1]Respondent cites *Bloomer* v. *Liberty Mutual Insurance Co.*, 445 U.S. 74, 79 (1980), a case involving the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, for the proposition that a compensation lien attaches to "any duplicate recovery made in the third party litigation." Resp. Br. 6 & n.2. In *Bloomer* the Court was merely describing the decisions of several lower courts that had read a right of reimbursement into the LHWCA. As we showed in our opening brief (at 18-19), the lower courts have gone on to hold that that right of reimbursement extends to all parts of an employee's third party recovery, including damages for pain and suffering. Respondent's attempt (Br. 14) to distinguish the LHWCA cases on the ground that medical expenses and lost wages were provable items of damages in those cases is unsuccessful. Like respondent, the longshoremen in those cases received damages that failed to cover all of their losses, so that a portion of their damages for pain and suffering was applied to reimburse the employer.

Respondent also attempts (Br. 14-15) to distinguish *United States* v. *Rogers*, 658 F.2d 296 (5th Cir. 1981), which held that the reimbursement provision of the Railroad Unemployment Insurance Act, 45 U.S.C. 362(*o*), requires a beneficiary to reimburse the Railroad Retirement Board in full, despite the fact that the Georgia no-fault statute limits tort liability for automobile accidents. Respondent correctly notes that in Georgia, unlike in other no-fault states, an individual may collect both no-fault benefits and workers' compensation (except when the employer has paid for the no-fault coverage). Ga. Code Ann. § 33-34-8 (1982). The briefs in *Rogers* indicate that the employee in that case did receive both no-fault benefits and compensation under the Railroad Unemployment Insurance Act. However, the court in *Rogers* based its holding solely on the language of the federal statute, which requires reimbursement from "any sum or damages paid or payable" to an employee on account of a tort liability. There is no indication that the court would have construed the statute differently if the employee had not received no-fault benefits (*e.g.*, because the employer had provided the no-fault coverage).

Respondent continues to characterize Section 8132 as involving a right of subrogation and to insist that the government's rights thereunder depend on the beneficiary's ability to recover tort damages for medical expenses and lost wages. But as we pointed out in our opening brief (at 13 n.3), Section 8132 is not a subrogation provision; instead, it simply confers on the federal government the right to be reimbursed from whatever amount an employee is able to recover from a third party in satisfaction of a liability to pay damages for an injury or death. That federal right exists independent of any state law limitation on tort liability in the third party action.[2]

Even if Section 8132 were merely an adjunct to the government's right under 5 U.S.C. 8131 to receive an assignment of an employee's cause of action against a third party, as respondent contends (Br. 7-8 & n.4), the government's right of reimbursement would not be confined to particular elements of the employee's recovery. As we explained in our opening brief (at 15-16), Section 8131 authorizes the Secretary of Labor to require an assignment of the employee's "right of action" and to prosecute or compromise that "cause of action." Since the cause of action encompasses the right to recover for pain and suffering caused by an accident, as well as medical expenses and lost wages, the Secretary under Section 8131 can recover any of these types of damages and remit them to the FECA fund to cover compensation paid to the employee. Section 8132 undoubtedly authorizes a similar result when the employee himself brings the third party action.

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[2]Cf. *United States* v. *Limbs*, 524 F.2d 799, 801 (9th Cir. 1975) (characterizing Section 8132 as conferring a "right to reimbursement" that is analogous to a quasi-contractual right, rather than to a tort claim, for purposes of choosing a limitations period).

2. Section 8132 on its face requires reimbursement from any amount an employee recovers in a third party action, whether the amount represents damages for medical expenses and lost wages or for pain and suffering. See Gov't Br. 13-14; *Ostrowski* v. *Dep't of Labor, OWCP*, 653 F.2d 229, 230 (1981); *United States* v. *Hayes*, 254 F. Supp. 849, 851 (W.D. Ky. 1966). Even the court below recognized that Section 8132, as drafted, appears to permit the government to obtain reimbursement from any part of an employee's recovery. See Pet. App. 6a. Respondent, too, characterizes this as "the most literal interpretation" of Section 8132 (Br. 11).

Respondent purports, however, apparently for the first time in this litigation, to find an ambiguity in the statutory language. He suggests (Br. 11-12) that the term "damages" might be read to include an award for property damage and that our reading of Section 8132 therefore would require an employee to reimburse the FECA fund from, *e.g.*, his award for damage to his automobile.

The new "ambiguity" respondent claims to have discovered does not exist. Under Section 8132, the government's right to reimbursement applies only to amounts an employee receives in satisfaction of a liability based on "an injury or death for which [FECA] compensation is payable." The latter phrase clearly signifies an injury to the person, not any property damage that might occur at the same time as an injury or death.[3]

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[3]Respondent presumably is well aware that the Secretary does not take the position that the right of reimbursement extends to awards for property damage. Form CA-162, on which FECA reimbursement computations are made, provides for an initial deduction from an employee's gross recovery of the amount received for property damage.

Respondent persists in contending (Br. 12-13 & n.7) erroneously that Congress last amended Section 8132 in 1966 and therefore could not have foreseen problems created by no-fault legislation. In our opening

3. Finally, respondent contends (Br. 15) that any administrative burden that might result from the decision below is irrelevant. But, as we explained in our opening brief (at 30-33), Section 8132 should be read in light of Congress's purpose of creating a program the Secretary could administer in a uniform and efficient manner. See, *e.g.*, *Ward* v. *Dep't of Labor*, 726 F.2d 516, 518 (9th Cir. 1984) ("a federal employee's rights under the FECA should not depend upon where in the country he is located"). Cf. *United States* v. *Ferguson*, No. 82-1227 (6th Cir. Feb. 7, 1984), slip op. 9 (quoting *United States* v. *Standard Oil Co.*, 332 U.S. 301, 309 (1947)) ("to require the United States to comply with the varied insurance regulations of each of the fifty states as a condition to its historic right to obtain compensation for damage to its property would result 'in substantially diversified treatment where uniformity is indicated as more appropriate, in view of the nature of the subject matter and the specific issues affecting the Government's interest' "). Requiring the Secretary to adjust the reimbursement rights of the federal government to accommodate each and every variation of state no-fault law would clearly undermine this legitimate legislative concern.[4]

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brief (at 26-27), we described the 1974 amendment to Section 8132, which granted the government a lien on any third party recovery by an employee. Since the no-fault trend was especially strong in 1974 and the years that immediately preceded, Congress obviously had ample opportunity to modify Section 8132 in response to that trend if it had wished to do so. See Gov't Br. 26-27.

[4]As we explained in our opening brief (at 28-29 n.16, 30-32), each state no-fault scheme is somewhat different. See also King, *State No Fault Systems — Attorney's Guide to Statutory Provisions*, 4 Pace L. Rev. 297 (1984). Moreover, it is not uncommon for states to enact significant amendments to their no-fault statutes, which would make it particularly difficult for the Secretary to adjust the federal program to state law. See Gov't Br. 31-32 n.20 (describing provisions of the 1984 amendments to the New Jersey no-fault statute). In this connection, we

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
*Solicitor General*

APRIL 1984

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note that the Pennsylvania legislature has enacted a new no-fault statute, scheduled to take effect on October 1, 1984. Motor Vehicle Financial Responsibility Law, Pub. L. Nos. 11 and 12 (enacted Feb. 12, 1984) (to be codified at 75 Pa. Cons. Stat. §§ 1701 *et seq.*). The new statute, while not purporting to abolish tort liability, precludes an individual from pleading, introducing into evidence, or recovering the amount of required no-fault benefits paid or payable (*id.* § 1722).

DOJ-1984-04

No. 83-838-CFX
Status: GRANTED

Title: United States, Petitioner
v.
Paul B. Lorenzetti

Docketed:
November 18, 1983

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Sovel, Charles

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Sep 10 1983 | | Application for extension of time to file petition and order granting same until November 19, 1983 (Brennan, September 13, 1983). |
| 2 | Nov 18 1983 | G | Petition for writ of certiorari filed. |
| 3 | Dec 21 1983 | | DISTRIBUTED. January 13, 1984 |
| 4 | Dec 21 1983 | X | Brief of respondent Paul B. Lorenzetti in opposition filed. |
| 5 | Jan 6 1984 | X | Reply brief of petitioner United States filed. |
| 6 | Jan 16 1984 | | Petition GRANTED. |
| | | | ********** |
| 7 | Jan 25 1984 | G | Motion of the Solicitor General to dispense with printing the joint appendix filed. |
| 8 | Feb 21 1984 | | Motion of the Solicitor General to dispense with printing the joint appendix GRANTED. |
| 9 | Mar 7 1984 | | Brief of petitioner United States filed. |
| 10 | Mar 13 1984 | | Record filed. |
| 11 | Mar 13 1984 | | Certified copy of partial proceedings and appendix received. |
| 12 | Mar 20 1984 | | SET FOR ARGUMENT. Monday, April 23, 1984. (4th case) |
| 13 | Apr 2 1984 | | Record filed. |
| 14 | Apr 5 1984 | | CIRCULATED. |
| 16 | Apr 6 1984 | X | Brief of respondent Paul B. Lorenzetti filed. |
| 17 | Apr 13 1984 | X | Reply brief of petitioner United States filed. |
| 18 | Apr 23 1984 | | ARGUED. |